

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In re Applications of)	
)	
NEXTEL COMMUNICATIONS, INC.,)	
Transferor,)	
)	
and)	
)	
SPRINT CORPORATION,)	WT Docket No. _____
Transferee,)	
)	
)	
for Consent to the Transfer of Control of)	
Entities Holding Commission Licenses and)	
Authorizations Pursuant to Sections 214 and)	
310(d) of the Communications Act)	

APPLICATION FOR TRANSFER OF CONTROL

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APPLICATION FOR TRANSFER OF CONTROL

I. BACKGROUND.

A. Description Of The Transaction.

On December 15, 2004, Sprint Corporation (“Sprint”) and Nextel Communications, Inc. (“Nextel”) (collectively the “Applicants” or the “Parties”) entered into an agreement for a merger of equals to combine operations and assets valued at approximately \$70 billion.¹ Sprint and

¹ The parties have agreed to merge Nextel into S-N Merger Corp., a wholly owned subsidiary of Sprint. The merger will be achieved through a stock-for-stock transaction, with Nextel shareholders receiving 1.28 shares of Sprint common stock, as well as approximately \$0.50 in cash for each Nextel common share. The foregoing estimate of the stock/cash allocation is based on facts existing on December 15, 2004, the date of the Sprint Nextel merger announcement. Existing Sprint shares will remain outstanding. All Nextel capital stock will be cancelled at the effective time of the merger. The actual stock/cash allocation is subject to adjustment in order to facilitate the spin-off of Sprint’s incumbent local telecommunications business on a tax-free basis, and will be determined

Nextel intend, promptly after the closing of the merger, to spin-off Sprint's incumbent local exchange carrier business to Sprint Nextel shareholders.² A copy of the Agreement and Plan of Merger ("Agreement") is attached hereto as Attachment A.

Upon receipt of necessary approvals and consummation of the merger, the combined entity will be one of America's premier communications companies – the leading independent wireless carrier with a nationwide fiber optic and global IP network that will offer broadband wireless and integrated communications services to consumer, business, and government customers. With the completion of this merger of Sprint and Nextel, Sprint Nextel will be well-positioned in some of the fastest growing areas of telecommunications, including mobile data services and push-to-talk features, where the companies have been technological pioneers.

Sprint Nextel will be led by senior executives from both Sprint and Nextel. Timothy M. Donahue, President and Chief Executive Officer of Nextel, will become Chairman of Sprint Nextel. Gary D. Forsee, Chairman and Chief Executive Officer of Sprint, will become President and Chief Executive Officer of Sprint Nextel. Len Lauer, President and Chief Operating Officer of Sprint, will become Chief Operating Officer of Sprint Nextel. The board of directors of Sprint Nextel will be composed of twelve members, drawn equally from the pre-merger boards of the two companies and will have two co-lead independent directors, one from each company. The rest of the management team will be composed of members of management from both of the

at the effective time of the merger. The equity interests in Sprint and Nextel are being valued equally in the merger, and the stock/cash allocation contemplated by the Merger Agreement is designed so that Nextel's existing shareholders will own slightly less than 50% of Sprint's common stock after the transaction closes.

² At closing, Sprint will change its corporate name to Sprint Nextel.

companies. Sprint Nextel will have its executive headquarters in Reston, Virginia, and its operational headquarters in Overland Park, Kansas.

1. Transfer Of Control Of Nextel Under The Communications Act And FCC Rules.

As a matter of communications law, the proposed merger will result in a transfer of control of Nextel's licenses and authorizations, requiring FCC approval under sections 214 and 310(d) of the Communications Act of 1934, as amended ("Act"). Upon receipt of FCC approval and consummation of the proposed transaction, Nextel's separate corporate existence will cease. Nextel's current wholly owned subsidiaries holding section 214 authorizations and/or radio licenses will survive as wholly owned subsidiaries of Sprint Nextel.³ The transaction does not require assignment of any of Nextel's authorizations or licenses, or any change in the licensees that hold such authorizations and licenses. The same companies will continue to provide service to the public; the only change in ownership will occur at the holding company level. Similarly, Sprint's wholly owned subsidiaries will be held by Sprint Nextel and will continue to provide service to the public. The merger does not involve a change in control of these companies under the Act.

³ The following types of FCC licenses and authorizations held by Nextel entities will be involved in the transfer of control: CMRS (including 800 MHz, 900 MHz, and Microwave); PMRS (including 800 MHz and Microwave); 700 MHz Guard Band; BRS (formerly MDS); WCS; Cable Television Relay Service; Earth Station; Experimental; and International Section 214 Authority. In addition, Nextel's decision to accept the terms of the Commission's Report and Order in WT Docket No. 02-55 reconfiguring the 800 MHz Land Mobile Radio band (discussed further below in Section II(G)), grants Nextel 1.9 GHz Personal Communications Service licenses, which are incorporated herewith as part of this Application. See Letter from Timothy M. Donahue to Chairman Michael Powell, WT Docket No. 02-55 (Feb. 7, 2005). As part of the acceptance of the 800 MHz reconfiguration, Nextel will be surrendering the 700 MHz Guard Band spectrum.

In addition to FCC approval, the transaction is subject to notification to and/or review by other governmental agencies, including Department of Justice review pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a), and the rules promulgated thereunder, a few state public utility commissions, and certain foreign countries.

2. The Proposed Transaction Is In The Public Interest.

As explained more fully below, the transaction serves the public interest, convenience, and necessity, and the Commission should grant the application. At a minimum, the merger of Sprint and Nextel will:

- Create a strong, independent, and innovative competitor in the telecommunications marketplace that will enhance competition for mobile telephony services and bring about significant movement toward true intermodal competition;
- Improve noticeably wireless service coverage, capacity, and quality by allowing cost-effective optimization of the Sprint and Nextel cell sites, spectrum, networks, and operations;
- Deploy broadband infrastructure more efficiently, obviating the need for a multi-billion dollar investment by Nextel in new wireless communications facilities; and
- Develop wireless, interactive multimedia communications solutions for urban and rural consumers and businesses using spectrum in the 2.5 GHz band.

With its network and spectrum assets, Sprint Nextel will offer a wide array of products and features to address customer needs. The new company will possess robust wireless network capabilities, including Nextel's existing nationwide 800 MHz and 900 MHz iDEN[®] network, Sprint's current national 1.9 GHz Code Division Multiple Access ("CDMA") voice and high-speed data network, and the merged company's planned 1xEV-DO Revision A ("1xEV-DO Rev. A") enhanced data network that it intends to deploy beginning in late 2006 or early 2007. The

merger will bring the services and capabilities of 1xEV-DO Rev. A to both current and future Sprint Nextel subscribers faster than Sprint could have achieved on a stand-alone basis.⁴

In the *Cingular Order*, the Commission understood that the integration of multiple wireless networks (six in the case of AT&T Wireless and Cingular) takes time, but it recognized that “[O]nce the combined entity integrates the two existing systems, including consolidating what will be duplicate [multiple] networks, the amount of spectrum available to support current as well as new customers will be greater than either existing company currently commands.”⁵ Similarly, Sprint Nextel will have access to more spectrum to support current and future customers – and to tailor its networks and services to meet the needs of a broader range of customers – than either company would have alone.

As discussed more fully below, the proposed merger will not only ensure an efficient deployment of broadband infrastructure, it will yield substantial economies. In particular, the merger will obviate the need for a multi-billion dollar investment by Nextel in new advanced network facilities that would offer services that Sprint is already in the process of deploying. These savings will enable Sprint Nextel to focus its financial and technical resources on enhancing the existing CDMA network, including adding high-performance push-to-talk

⁴ CDMA 1xEV-DO Rev. A (also known as IS-856 Release A) will enhance the capabilities of CDMA EV-DO technology for voice and data capabilities. CDMA 1xEV-DO Rev. A is expected to provide a peak downlink data rate of 3.1 mbps, with an anticipated average data rate of 400-600 kbps. Uplink data rates peak at 1.8 mbps, with average user data rates in the 300-500 kbps range. See Joint Declaration of Oliver Valente and Barry West, Attachment C ¶ 12 (“Valente/West Declaration”).

⁵ *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer of Control of Licenses and Authorizations, Memorandum Opinion and Order*, 19 FCC Rcd 21522 ¶ 210 (2004) (“*Cingular Order*”).

features, making it the premier mobile broadband network in the industry.⁶ Following the proposed merger, Sprint Nextel plans to enhance the coverage and capacity of the CDMA network by sharing such network assets as cell site leases and physical facilities. The Applicants will be able to improve the coverage and capacity of both the CDMA and iDEN networks by combining their cell site portfolios and filling gaps in existing coverage areas. In particular, adding CDMA infrastructure to existing iDEN cell site shelters will result in major improvements in CDMA coverage – both for the current network and the future 1xEV-DO Rev. A overlay – at substantial cost savings.⁷

In the near term, the company could work with its vendors to develop a multi-mode phone that will allow customers access to the iDEN and CDMA networks of the merged company.⁸ Within the networks, gateway facilities will be added to enable these different networks to interoperate over an IP infrastructure. Thus, the merger will expand the availability of high-performance push-to-talk features as well as state-of-the-art broadband services, and, like Cingular’s merger with AT&T Wireless, “the additional spectrum the combined entity will have

⁶ The company will operate the iDEN network to serve customers whose needs are most economically and efficiently met on a voice and narrowband data network, while customers desiring or requiring high-speed data and other broadband features will be more interested in the CDMA network. *See* Valente/West Declaration ¶ 33.

⁷ *See Cingular Order* ¶ 210 (identifying improvements in service quality, including increased capacity and reduced coverage holes, as a basis for approving a transfer of control application).

⁸ Currently, there are no handsets in existence that would permit CDMA customers to roam on the iDEN network, and vice versa.

available, in terms of both capacity and geographic coverage, should facilitate the combined entity's deployment of more robust and ubiquitous advanced services.”⁹

Thus, the combination of Sprint and Nextel is expected to yield significant efficiencies, as discussed in more detail below, amounting to a total net present value of approximately \$12 billion. Several synergies flow from the combination of the customer base (and potential customer base) and assets of the two companies. For example, the merged company will enjoy economies in connection with the acquisition of network equipment and handsets and other terminal devices. This will reduce costs and improve the competitive posture of the merged company, to the benefit of consumers.

The merger will allow the elimination of redundant cell sites, resulting in long-term cost savings for the combined company in terms of both capital expenditures and network operating expenses. The migration of Nextel's backhaul traffic from current leased facilities to Sprint's fiber network and IP backbone will generate additional savings, as will operational efficiencies in IT, billing, and customer care. All of these synergies and efficiencies improve the competitive posture of the company, promising welfare benefits to society from increased competition in addition to overall cost reduction and its concomitant effect on prices.

The merger will enable the company to undertake future investments in research and development that will lead to the implementation of cutting-edge, multimedia products and services that will generate economic growth and bring tremendous innovation and value to consumers. In the 2.5 GHz band, Sprint and Nextel intend to offer bandwidth-intensive applications that incorporate devices, applications, and smart network technologies into an

⁹ *Cingular Order* ¶ 225.

intuitive user service.¹⁰ The resulting services, which the Applicants refer to as wireless interactive multimedia services, would be distinct from any existing or planned CMRS offering. Wireless interactive multimedia services would focus on stationary and portable consumer electronic and computing-oriented devices and hardware. As described in the Rowley/Finch Declaration, the merger generally increases the breadth of the geographic coverage of, but not the depth of, the combined company's 2.5 GHz licenses and leases.¹¹ The majority of Nextel's BRS/EBS licenses and leases are located in the Northeast, the Central states and the South, while the majority of Sprint's BRS/EBS licenses and leases are located in the West and Upper Midwest. For the first time in the long and troubled history of the 2.5 GHz spectrum, therefore, the merger will create a carrier with a nearly nationwide footprint in the band, which will finally

¹⁰ The companies' combined 2.5 GHz spectrum holdings extend to Alaska and other rural areas. The Sprint Nextel merger offers the promise of enhanced economies of scale that could enable the accelerated deployment of wireless interactive multimedia services to far more rural communities than if each carrier acted alone.

¹¹ The 2.5 GHz spectrum, located in the 2496-2690 MHz band, houses the Educational Broadband Service (EBS) (formerly the Instructional Television Fixed Service (ITFS)) as well as the Broadband Radio Service (BRS) (formerly the Multipoint Distribution Service (MDS)) and the Multichannel Multipoint Distribution Service (MMDS). The services were renamed pursuant to a revised regulatory regime for the bands that became effective on January 10, 2005. System operators in the 2.5 GHz band (both licensees and lessees) generally provide four categories of service offerings today: (1) downstream analog video; (2) downstream digital video; (3) downstream digital data; and (4) downstream/upstream digital data. *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 ¶¶ 1, 15 (2004) ("BRS Order").

enjoy economies of scale and scope necessary to introduce new bandwidth-intensive, interactive, multimedia services using 2.5 GHz spectrum.¹²

Over the years, Sprint and Nextel has each worked to partner with companies and brands that add scale and scope and provide additional value-added benefits. These relationships have bolstered both companies' marketplace standing. Sprint Nextel will continue to pursue these opportunities, and will be able to do so – with national CMRS and BRS footprints and a multitude of service offerings. The combined entity also will utilize Sprint's nationwide and international fiber optic wireline network, which includes 30 Sprint-owned metropolitan area networks in the U.S. and 37 international fiber points of presence. These assets, coupled with extensive experience in successful collaborations, will allow content providers, systems integrators, mobile virtual network operators, and other new telecommunications entrants to be vital partners to Sprint Nextel. These collaborations will provide additional competitive benefits, features, and services for consumers.

In sum, this merger is ultimately about growth. It will create a robust wireless competitor that will be able to more effectively compete for a broader range of customers in the mobile telephony industry. Verizon Wireless and Cingular each has greater subscriber share and, in many geographic areas, Cingular will have more spectrum than the combined company will have. After closing, Sprint Nextel will derive more than 80% of its revenues from wireless

¹² In the few Basic Trading Areas (BTAs) in which both Sprint and Nextel hold spectrum licenses or leases, the company with the smaller spectrum position generally has an inconsequential holding. Thus, the merger will not lead to materially increased concentration in this band in any given geographic area because Sprint's and Nextel's spectrum resources are predominantly complementary. *See* Joint Declaration of Todd Rowley and Robert Finch, Attachment E ¶ 8 ("Rowley/Finch Declaration").

service and will have a greater ability to compete with these and the other firms than either company would have separately.

Finally, at closing of the transaction, Sprint Nextel will have incumbent local wireline operations in 18 states that currently serve approximately 7.7 million local access lines. As described in more detail below, the Parties intend that the merged company will spin off its ILEC assets in these 18 states to its shareholders. Thereafter, Sprint Nextel will be able to focus on its vision of the “wireless future” in which wireless services expand in scope, intensity of use, and competition with other means of connecting people to their communities and the world. In contrast, major competitors of Sprint Nextel such as Verizon Wireless and Cingular are owned by parents that have significant ILEC operations.¹³ The wireless arms of these legacy (and still predominantly) wireline ILEC companies will mold their competitive strategies and tactics to maximize overall profitability, as the Commission recently observed with respect to Cingular.¹⁴ Sprint Nextel, on the other hand, will have greater ability and incentive to focus on its wireless business strategies. Thus, the merger of Sprint and Nextel should accelerate the increasing substitution of wireless-based services for wireline-based services, thereby creating growth in the wireless industry.

¹³ See *Cingular Order* ¶ 237, n.556 (classifying Sprint as an independent wireless carrier).

¹⁴ *Id.* ¶ 237 (“We find it relevant, in analyzing this proposed transaction, that Cingular is owned by the second and third largest RBOCs. Because BellSouth and SBC derive such a significant portion of their revenues from their in-region wireline operations, these companies have an incentive to protect their wireline customer base from intermodal and intramodal competition.”) (footnotes omitted).

B. Description Of The Applicants.

1. Sprint.

Sprint Corporation is a publicly traded Kansas corporation with headquarters in Overland Park, Kansas.¹⁵ Sprint is a global communications company providing wireless, long distance, and local communications services. Sprint had \$27 billion in annual revenues for the twelve months ending September 30, 2004. Sprint built and operates the United States' first nationwide all-digital, fiber-optic network. With this network, which includes a global Tier 1 IP backbone, Sprint provides a broad suite of voice and data services to domestic and global customers.

Sprint built, and continues to deploy, the first all-digital, all-PCS nationwide wireless network from the ground up, currently serving more than 24 million wireless customers in more than 350 Metropolitan Statistical Areas ("MSAs").¹⁶ Since its inception, Sprint has been a leader in advanced wireless technology. Sprint was the first carrier to deploy a CDMA network. Shortly thereafter, Sprint upgraded its network to include enhanced variable rate coding ("EVRC"), increasing the network capacity and further ensuring efficiency. Sprint then launched 1xRTT voice and data service, expanding voice capacity and providing end users wireless access to Internet and other data services. Sprint's CDMA network covers 99% of major metropolitan areas, airports, and highways in 48 states, the U.S. Virgin Islands, and Puerto

¹⁵ S-N Merger Corp., a wholly owned subsidiary of Sprint, the Transferee in this Application, is a Delaware Corporation.

¹⁶ As of the end of 4Q 2004, the Sprint wireless network serves a total of 24.8 million subscribers: 17.8 million direct, postpaid retail subscribers, 3.3 million through affiliates, and 3.7 million wholesale/MVNO subscribers. Sprint's Local Telephone Division serves approximately 7.7 million access lines in 18 states.

Rico. Together with its affiliates¹⁷ and roaming partners, Sprint offers wireless service in all 50 states. Sprint offers both voice and data services (with data speeds averaging 50 to 70 kbps) on its wireless network.

Sprint also has built one of the largest fiber networks in the U.S. This network has significant operational advantages, including the ability to seamlessly interconnect a variety of technologies, accommodate diverse standards and protocols, and provide secure communications. Sprint's wireline network is extensive and robust. Its U.S. network consists of more than 34,000 physical route miles of fiber optic cable. Its global network consists of over 75,000 route miles of fiber, including an ownership stake in major undersea cable systems.

The U.S. network is an integrated infrastructure based on Dense Wave Division Multiplexing ("DWDM") and Synchronous Optical NETwork ("SONET") backbone. There are 505 SONET rings and 369 points of presence nationwide reaching all major metropolitan areas in which all services are available. In addition, Sprint's domestic wireline network includes Metropolitan Area Networks ("MANs") in metropolitan areas across the United States. MANs extend Sprint's SONET rings to ILEC end offices and PCS switches and extend the network to within the "last mile" of customers. Sprint's wireline network supports IP, ATM, Frame Relay, and TDM services with flexible mix-and-match architecture for smooth migration to future technology.

Through its Global Network, Sprint offers an expansive portfolio of global voice, frame relay, ATM, and managed IP services. The global network is an integrated infrastructure that includes elements of Sprint's wholly owned network and partner networks. Sprint offers a

¹⁷ The term "affiliate" is used in its colloquial sense rather than as a term of art as found in the Communications Act or the Securities Exchange Act of 1934 and similar statutes.

global OC-192 backbone, as well as a Tier One Native IP network that connects locations in North America, South America, Europe, and Asia-Pacific. Sprint has 37 facilities-based points of presence overseas. There is IP access in nearly 150 countries, and 25% of the Internet is directly connected to Sprint's public IP network. Global voice services are available to over 220 countries worldwide. The following voice services are provided on the Global Network: local, long distance, VoIP, and wireless. Sprint also offers data services, including Virtual Private Networks; switched data services such as Frame Relay, ATM, and IP; point-to-point data services such as private line and Ethernet; and remote access data such as DSL, dial-up IP, and WiFi.

Sprint is qualified to control the licenses involved in the instant transaction. Sprint is currently authorized by the FCC to provide domestic and international long distance service as well as offerings in the Personal Communications and Broadband Radio Services. In addition, Sprint has not "made any representations or acted with a lack of candor in any of its proceedings before the Commission" nor has it engaged in a "pattern of willful violations of the Communications Act or the Commission's rules."¹⁸ Sprint has not engaged in or had judicial decisions against it for non-Commission-related misconduct relevant in deciding whether the transaction serves the public interest, convenience, or necessity including: "(1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of

¹⁸ *Cingular Order* ¶ 48.

antitrust or other laws protecting competition.”¹⁹ Last year, the Commission found Sprint, through its wholly owned subsidiary WirelessCo, L.P., qualified to hold CMRS licenses.²⁰

2. Nextel.

The Commission has found Nextel equally qualified to hold the licenses involved in the instant transaction.²¹ Nextel is a publicly traded Delaware corporation with headquarters in Reston, Virginia. Nextel’s predecessor, Fleet Call, Inc., was founded in 1987, and the company took its current name in 1993. Nextel currently provides its innovative all-digital wireless services in thousands of communities across the United States, including 202 of the top 300 U.S. markets where approximately 217 million people live or work. Nextel and Nextel Partners Inc. together currently serve 297 of the top 300 U.S. markets where nearly 260 million people live or work. Nextel has more than 16 million subscribers, with 2003 revenues of approximately \$10.8 billion, and revenues for the first nine months of 2004 of about \$9.8 billion.

Nextel provides a wide range of digital wireless voice and data communications services over its packet-based “iDEN[®]” technology network developed in conjunction with Motorola, Inc. Operating primarily on Specialized Mobile Radio (“SMR”) licenses in the 800 MHz and 900 MHz bands, Nextel’s iDEN network provides a comprehensive suite of advanced wireless services and features, including digital wireless mobile telephone service, Nextel Nationwide

¹⁹ *Id.* ¶ 47 (footnote omitted).

²⁰ *See Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications*, Report No. 1729 (Jan. 28, 2004) (consenting to the assignment of call sign WPZU405 (previously KNLF206) to WirelessCo L.P.).

²¹ *See Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., Memorandum Opinion and Order*, 19 FCC Rcd 6232 ¶ 26 (2004) (“*WorldCom-Nextel Order*”).

Direct Connect™, and Nextel International Direct Connect™ walkie-talkie features, and such wireless data services as Internet access and short messaging. In particular, Nextel's Direct Connect feature is a significant and innovative advancement over traditional analog dispatch services, because it expands the typical dispatch service coverage area, uses the spectrum more efficiently, and provides extra security through digital multiplexing technology.

Nextel has sought additional spectrum capacity and flexibility to support evolving customer interest in next-generation digital wireless services. For example, in 2004, Nextel acquired MDS and MMDS authorizations and other wireless licenses in various geographic areas throughout the United States from WorldCom, Inc. and Nucentrix Broadband Networks, Inc.²² In addition, as discussed further in Section II(G) of this Application, as a result of Nextel's decision to accept the terms of the Commission's *Report and Order* reconfiguring the 800 MHz band,²³ the Commission will modify Nextel's wireless licenses to authorize operations using an additional 10 MHz of CMRS spectrum proximate to Sprint's 1.9 GHz PCS spectrum assignments (at 1910-1915/1990-1995 MHz).

Nextel's business strategy has been to provide differentiated products and services in order to acquire and retain the most valuable customers in the wireless telecommunications industry. Currently, a key focus for Nextel's varied products and services is the business community. Nextel helps corporations and government enterprises add value through Nextel

²² See *Wireless Telecommunications Bureau Grants Consent to Assign Multipoint Distribution Service Station Licenses, Public Notice*, 19 FCC Rcd 6329 (2004); see generally *WorldCom-Nextel Order*.

²³ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) ("800 MHz R&O").

Wireless Business Solutions and Custom Network Solutions. In short, Nextel is an innovator in enabling businesses, both large and small, to “get the job done” by matching and exceeding their mobile communications needs.

C. Description Of Affiliates.

Nextel Partners is licensed by the FCC at 800 MHz to provide CMRS services. It provides digital wireless communications services using its own iDEN network under the Nextel brand name in mid-sized, secondary and rural U.S. markets, and has the right to operate in 98 of the top 300 MSAs in the United States. Nextel owns approximately 32% of Nextel Partners’ outstanding stock.²⁴

The merger will give the shareholders of Nextel Partners the option of voting to exercise certain put rights under Nextel Partners’ certificate of incorporation. Under the terms of these arrangements, Nextel Partners’ shareholders may vote to require Nextel to purchase the Nextel Partners shares it does not own and seek FCC approval to transfer the licenses under Nextel Partners’ control. Nextel Partners’ certificate of incorporation specifies a process both for the manner in which Nextel Partners’ shareholders are allowed to exercise those rights and for determining the price at which Nextel Partners’ shares would be purchased that is based on fair market value. The process for making the election to exercise the put rights and for determining the purchase price for Nextel Partners’ shares may extend for a substantial time after the Sprint

²⁴ Nextel also owns approximately 18% of the outstanding common stock of NII Holdings, Inc. (“NII”), which provides iDEN-based wireless communications services primarily in selected Latin American markets. Nextel has roaming agreements with NII that enable Nextel’s subscribers to roam on NII’s networks. This includes full Direct Connect feature interoperability among Nextel and NII customers between the United States and NII’s Latin American markets. Nextel also has a roaming agreement with Telus enabling iDEN roaming for Telus and Nextel customers between Canada and the United States and Direct Connect interoperability between subscribers in the two countries.

Nextel merger is consummated. Because these arrangements could result in Nextel ultimately owning the licenses and other assets of Nextel Partners, the competition analysis provided in this application generally analyzes markets that are licensed to Nextel Partners as if they are licensed to Nextel.²⁵

Sprint's wireless footprint has been expanded to certain areas of the United States through relationships with independent PCS affiliates, which were typically employed in smaller markets to permit Sprint to obtain national coverage more quickly and to provide local market expertise. Currently, Sprint has relationships with twelve different affiliates, some of which are publicly traded and provide service to more than three million subscribers. Generally, the affiliates construct PCS networks and provide service over licenses held and controlled by Sprint, although Sprint does not have ownership interests in these affiliates.²⁶ The affiliates own the equipment and manage the networks pursuant to management agreements and parameters established by Sprint. Sprint provides customer care and billing services for the affiliates, and postpaid subscribers typically make payments directly to Sprint.²⁷ Packaging and pricing of the PCS service are typically performed by Sprint, with some flexibility to offer special local price

²⁵ This assumption and many others embedded in our analysis overstate the overall size and geographic reach of Sprint's and Nextel's holdings. This conservative approach makes the analysis more manageable. It also reinforces the strength of the conclusion that this transaction will benefit competition and other facets of the public interest.

²⁶ Sprint affiliates may also have their own licenses over which they provide CMRS.

²⁷ Customer care for Sprint-branded stores operated by affiliates is provided by affiliate employees. Affiliates may also provide their own billing and care in addition to that supplied by Sprint for certain manager-provided products (*e.g.*, prepaid services) authorized by Sprint.

plans and promotions. For purposes of the competition analysis provided in this application, markets that are managed by Sprint affiliates are analyzed as part of Sprint's service areas.

D. Standard Of Review.

The Commission's review of the proposed Sprint Nextel merger is governed by sections 214(a) and 310(d) of the Communications Act of 1934, as amended. Pursuant to those sections, the FCC should grant the proposed transfer of control upon finding that the transaction serves the public interest, convenience, and necessity.²⁸ To make this finding, the Commission examines whether the merger complies with specific provisions of the Communications Act, other applicable statutes, the FCC's rules, and federal communications policy.²⁹ The potential public interest harms of the transaction, if any, are weighed by the Commission against potential benefits. The Applicants, however, only must demonstrate by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.³⁰

²⁸ 47 U.S.C. §§ 214(a), 310(d).

²⁹ See, e.g., *Cingular Order* ¶ 40; *WorldCom-Nextel Order* ¶ 23; *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in Possession, to subsidiaries of Cingular Wireless LLC, Memorandum Opinion & Order*, 19 FCC Rcd 2570 ¶ 24 (2004); *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, For Authority to Transfer Control, Memorandum Opinion & Order*, 19 FCC Rcd 473 ¶ 15 (2003) ("*DirecTV Order*").

³⁰ See, e.g., *Cingular Order* ¶ 40; *DirecTV Order* ¶ 15; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee, Memorandum Opinion & Order*, 17 FCC Rcd 23246 ¶ 26 (2002) ("*AT&T-Comcast Order*"); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and Int'l Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion & Order*, 15 FCC Rcd 14032 ¶ 22 (2000) ("*Bell Atlantic-GTE Order*").

The scope of the FCC’s review is limited by section 310(d), which requires the Commission to dispose of the transfer application “as if the proposed transferee... were making an application under section 308 for the permit or license in question.”³¹ The Commission is not permitted to consider how the public interest, convenience, or necessity would be served by transferring the permit or license to an entity other than the proposed transferee.³² Typically, the Commission begins by examining the transferor’s and transferee’s qualifications to hold Commission licenses.³³ As noted in the descriptions of the Applicants set forth above, the FCC has repeatedly and recently affirmed Sprint’s and Nextel’s qualifications.³⁴

The FCC also has concluded that its public interest review requires an examination of the impact of the proposed transaction on competition. If potential anticompetitive effects are found, the FCC considers whether countervailing “efficiencies and other public interest benefits [are] likely to result from the proposed transfers of control of the licenses and authorizations.”³⁵ For

³¹ 47 U.S.C. § 310(d). *See also Cingular Order* ¶ 40, n.163.

³² 47 U.S.C. § 310(d).

³³ *See Motient Services Inc. and TMI Communications and Co., LP Assignors and Mobile Satellite Ventures Subsidiary LLC Assignee, Order and Authorization*, 16 FCC Rcd 20469 ¶ 12 (2001) (“*Motient & TMI Order*”); *Applications of VoiceStream Wireless Corp., Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310 of the Communications Act, Memorandum Opinion & Order*, 16 FCC Rcd 9779 ¶ 19 (2001) (“*VoiceStream, Powertel, Deutsche Telekom Order*”).

³⁴ The FCC generally does not “reevaluate the qualifications of transferors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.” *Cingular Order* ¶ 44 (footnote omitted).

³⁵ *Global Crossing Ltd. (Debtor-in-Possession), Transferor, and GC Acquisition Ltd., Transferee, Applications for Consent to Transfer Control of Submarine Cable Landing*

instance, the Commission may consider “whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger’s effect on future competition.”³⁶

The *Cingular Order*, adopted by the Commission four months ago, sets forth a framework for evaluating the competitive impact of the proposed transaction. In addition to a traditional examination of the merged firm’s market position measured in terms of subscribers and spectrum, the Commission considered whether the “presence of multiple other carriers who have the capacity to add subscribers and the ability to supplement their current capacity”³⁷ would diminish any potential anticompetitive effects of the proposed transaction.³⁸

With respect to the relevant product market for this analysis, the Commission concluded that there is a combined market for mobile telephony services that encompasses mobile voice

Licenses, Int’l and Domestic Section 214 Authorizations, and Common Carrier and Non-Common Carrier Radio Licenses, and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Order and Authorization, 18 FCC Rcd 20301 ¶ 17 (2003). See also *Motient and TMI Order* ¶ 12; *VoiceStream, Powertel, Deutsche Telekom Order* ¶ 17.

³⁶ *Cingular Order* ¶ 42 (footnote omitted). See also *Bell Atlantic-GTE Order* ¶ 23; *AT&T-Comcast Order* ¶ 28.

³⁷ *Cingular Order* ¶ 5.

³⁸ *Id.* ¶ 70 (“We begin by determining the appropriate market definitions to employ for the analysis, as well as identifying relevant market participants. We then measure the degree of market concentration. Next we consider the possible competitive harms that could occur due to a significant increase in market concentration or market power. Mergers can diminish competition and firms can exercise market power in a number of ways. A merger may create market power in a single firm and allow that firm to act on its own in raising prices, lowering quality, reducing innovation, or restricting deployment of new technologies or services.... A merger may also diminish competition by enabling the firms selling in the market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers.”).

and data services marketed to both residential and enterprise subscribers.³⁹ In considering the presence and capacity of other firms, the Commission focused on “the input market of spectrum that is suitable for provision of mobile telephony services.”⁴⁰ The spectrum that it found suitable for the provision of mobile telephony “includes cellular, PCS, and SMR spectrum and currently totals approximately 200 MHz of spectrum.”⁴¹ It expressly excluded spectrum that “is committed to non-mobile telephony uses currently and for the near-term future.”⁴²

With respect to defining the geographic market, the Commission concluded that the relevant “market is a local one... as opposed to a larger regional area or a nationwide area.”⁴³ The Commission relied upon two sets of geographic areas, 348 Component Economic Areas (“CEAs”) and 734 Cellular Market Areas (“CMAs”).

The Applicants have retained Professor Steven C. Salop of the Georgetown University Law Center, and Drs. Stanley M. Besen and John R. Woodbury of the economic consulting firm Charles River Associates, Inc. to prepare an economic analysis of the likely effect of the proposed transaction on competition. The analysis prepared by Drs. Salop, Besen, and Woodbury is attached hereto as Attachment B (referred to herein as the “CRA Analysis”).⁴⁴ The

³⁹ *Id.* ¶ 74.

⁴⁰ *Id.* ¶ 81.

⁴¹ *Id.*

⁴² *Id.* ¶ 81 n.283 (“Note that Advanced Wireless Service (‘AWS’) and Multipoint Distribution Service (‘MDS’) spectrum does not currently meet our criteria because it is committed to non-mobile telephony uses currently and for the near-term future.”).

⁴³ *Id.* ¶ 89.

⁴⁴ Joint Declaration of Stanley M. Besen, Steven C. Salop, and John R. Woodbury, Charles River Associates, Attachment B (“CRA Analysis”).

analysis provided in the CRA Analysis and reflected in this Application conforms in most aspects to the framework set forth by the Commission in the *Cingular Order*. Accordingly, this analysis presumes local geographic areas for the provision of mobile telephony services and considers the potential for unilateral and coordinated effects in these areas. Because CMAs are market definitions that have no applicability to Sprint or Nextel, however, they are omitted from the analysis. Similarly, as subscriber share data for CEAs is not commercially available, the Applicants have not evaluated the competitive impact of the proposed merger using CEAs as the relevant geographic area. The Applicants have, however, been able to obtain proprietary subscriber share data from a third-party vendor, Telephia, Inc. (“Telephia”), for all of the nationwide and certain regional wireless carriers. The Telephia data report subscriber share information for local geographic areas defined by Telephia by assigning counties to a given local service area.

II. THE PROPOSED TRANSACTION WILL SERVE THE PUBLIC INTEREST.

A. The Proposed Transaction Will Combine Companies With Truly Complementary Strengths And Position The Combined Company As America’s Premier Wireless Communications Company.

The proposed merger will create the third largest mobile wireless communications company in the country, and one of four firms with a nationwide footprint. The combined company has an estimated equity market capitalization of \$70 billion. As of December 31, 2004, it had more than 34 million direct wireless subscribers, as well as an additional 8.5 million subscribers served through affiliates and partners. Sprint Nextel will have a broad mix of consumer, business, and government customers, and a spectrum position sufficient to provide advanced broadband services.

Sprint Nextel's wireless network will serve over 350 MSAs, with an average of no more than 53.5 MHz in these markets. In most markets, the combined company will have between 40-60 MHz of CMRS spectrum, while in many others it will hold less than 40 MHz. In no case, however, will Sprint Nextel hold licenses for over 60 MHz of CMRS spectrum in any given area.⁴⁵ Including the spectrum managed by or licensed to non-party affiliates, Sprint Nextel will have more than 60 MHz of spectrum in only one area, Hawaii at 67.5 MHz; thus, its spectrum totals would still not exceed 70 MHz.⁴⁶ A detailed summary of the combined spectrum position by market, as well as detailed maps, are attached as Attachments F, G, H, and I.

The combination of these assets will enable Sprint Nextel to compete more effectively in the mobile wireless space than either company could on its own. Sprint Nextel customers will gain access to the industry's leading push-to-talk features and broadband offerings, all from one carrier, and the companies' combined operations will make possible a richer set of products, services, and features in the future.

1. Sprint Nextel's Combined Wireless Network Will Integrate Its Current And Future Offerings.

The new company's robust wireless CMRS network will include operations on Nextel's nationwide 800 MHz and 900 MHz iDEN and Sprint's 1.9 GHz CDMA networks, including Sprint's ongoing nationwide deployment of CDMA 1xEV-DO technology. Following the

⁴⁵ This excludes spectrum licensed to Nextel Partners.

⁴⁶ *See Cingular Order* ¶ 109 (finding that "although 70 MHz represents a little more than one-third of the total bandwidth available for mobile telephony today ... a market may contain more than three viable competitors even where one entity controls this amount of spectrum.").

merger, the Applicants plan to operate both the iDEN and CDMA networks, allowing consumers to capitalize on the respective strengths and features of each network.

The CDMA network will provide customers with broadband capabilities not currently available to Nextel customers. In August 2002, Sprint upgraded its network to CDMA 1xRTT technology, which doubled voice capacity and offers peak data rates up to 10 times faster than 2G CDMA technology. CDMA 1xRTT also supports wireless packet data, which enabled Sprint to deploy industry-leading data applications on the PCS Vision network, including picture mail, video mail, and the Ready Link™ push-to-talk feature.⁴⁷

Similarly, Nextel offers features not currently available to Sprint subscribers. For example, Nextel's iDEN network was built from the ground up to include Nextel's Direct Connect feature, considered the best of its type currently offered in the wireless industry. Direct Connect allows customers to communicate instantly with the 17 million plus subscribers of Nextel, Nextel Partners, and Boost Mobile,⁴⁸ using the Nextel network.⁴⁹ The feature enables customers to quickly establish private, one-to-one conferences nationwide or within a group, or local one-to-many conferences, allowing for more efficient communications than possible on a traditional wireless call.

⁴⁷ Valente/West Declaration, Attach. 1, ¶ 7.

⁴⁸ Boost Mobile, headquartered in Irvine, California, is a division of Nextel that focuses solely on developing and distributing iDEN-based communications products and services to youthful consumers. Nextel offers pay-as-you-go wireless phone and entertainment services under the Boost Mobile brand, which are designed to meet the lifestyle needs of today's active youth. See Boost Mobile, "About Boost," *available at* <http://www.boostmobile.com/about.html> (last visited Jan. 27, 2005).

⁴⁹ See Nextel SEC Form 10-K for the Fiscal Year Ended Dec. 31, 2003, at 3.

Following the proposed transaction, Sprint Nextel will operate both the CDMA and iDEN networks, and prospective customers who visit Sprint Nextel retailers after the merger will be able to ascertain which network and functionalities most efficiently, effectively, and economically address their needs.⁵⁰ Customers who need wireless broadband capabilities will be more interested in CDMA service, currently available on Sprint's network and handsets. Customers who prefer the robust, instant-communication push-to-talk functionality available through Direct Connect on Nextel's network will be more attracted to the iDEN network and handsets.

In addition, as discussed above, the Applicants could work with their vendors to develop multi-mode handsets and terminal devices to provide interoperable service between the Applicants' iDEN and CDMA networks and plan to deploy translation devices (or "gateways") to interpret and facilitate interoperability between the two networks.⁵¹ In short, both current and future Sprint Nextel customers will have a broader array of services and features to choose from than either company provides today or would be likely to provide in the future on a stand-alone basis.

2. Sprint Nextel Is Ideally Positioned To Deploy Advanced High-Speed 3G Data Services Expeditiously.

Sprint Nextel will be committed to advancing its industry-leading broadband offerings as it transitions to new third-generation ("3G") or other advanced technology platforms. As analysts have noted, the mobile business "is now entering a technology driven phase where availability of mobile data (e-mail, Internet access), base stations and mobile computing will

⁵⁰ Valente/West Declaration ¶¶ 10-12.

⁵¹ *Id.* ¶¶ 26-27, 45.

shape the market.”⁵² Consumer demand for wireless data services is growing tremendously, as demonstrated in part by Sprint’s successes. For example, the Commission observed that as of April 2004, nearly 28% of Sprint PCS customers subscribed to data services,⁵³ and more than four million were subscribed to Sprint’s advanced offering, PCS Vision. Since PCS Vision was launched in 2003, Sprint has sold more than 9.5 million games⁵⁴ and customers have shared “more than 100 million images and 15-second video clips.”⁵⁵ Sprint Nextel’s deployment of a 3G platform promises to accelerate these trends.

In June 2004, Sprint announced adoption of a CDMA 1xEV-DO solution as a 3G platform to enhance the PCS Vision network’s data rate and capacity. As noted above, this platform provides an order of magnitude increase in data rates.⁵⁶ Sprint has begun launching CDMA 1xEV-DO and plans to make the service available to 129 million people in 39 major cities this year; coverage will be extended to the vast majority of its licensed markets in 2005-2006.⁵⁷ As discussed above, Sprint Nextel will follow that deployment with the 1xEV-DO Rev. A upgrade throughout its network, offering peak downlink data rates of 3.1 mbps, with average

⁵² Paul Budde Communication Pty Ltd., *USA - Mobile Communications - Market Overview & Statistics* at 8 (2004), available for purchase at <http://www.budde.com.au/Reports/Contents/USA-Mobile-Communications-Market-Overview-Statistics-1838.html>.

⁵³ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Ninth Report*, 19 FCC Rcd 20597 ¶ 178 (2004) (“*Ninth CMRS Report*”). By year end, there were 6.2 million PCS Vision subscribers.

⁵⁴ *Ninth CMRS Report* ¶ 183.

⁵⁵ *Id.* ¶ 184.

⁵⁶ Valente/West Declaration Attach. 1, ¶ 9. *See also* n.5, *supra*.

⁵⁷ *3G Services Begin to Launch in U.S.*, Wall St. J., Jan. 18, 2005.

rates anticipated at 400-600 kbps, and peak uplink rates of 1.8 mbps, with average uplink user data rates from 300-500 kbps.⁵⁸

To accomplish their next-generation goals, the Applicants plan to migrate to an all-IP network architecture. Because 1xEV-DO Rev. A offers end-to-end IP connectivity for both data and voice, regardless of the type of access used, the Applicants plan to make an evolutionary migration toward that standard, as discussed above. 1xEV-DO Rev. A supports exceptional call setup times, provides excellent service quality, and can be deployed to the market in a competitive time frame. 1xEV-DO Rev. A also has ideal characteristics as a platform for a high performance push-to-talk feature over CDMA, and Sprint Nextel will deploy the push-to-talk feature using the 1xEV-DO Rev. A platform. Sprint's and, upon closing of the merger, Sprint Nextel's technology teams will be performing technical due diligence and trials of 1xEV-DO Rev. A in late 2005 through mid-2006. Network upgrades are expected to begin in late 2006 or early 2007 and should be completed in late 2007 or early 2008.⁵⁹

3. Sprint's Global Wireline Network Will Complement And Strengthen Sprint Nextel's Wireless Network.

The combination of Nextel's wireless assets with Sprint's wireless facilities and its U.S. and global fiber network will yield merger-specific benefits. Nextel will be able to move traffic from third party carriers to Sprint Nextel's own facilities, offering significant cost savings and service quality improvements. Sprint's fiber network is extensive and robust. Its U.S. network

⁵⁸ Valente/West Declaration Attach. 1, ¶ 11.

⁵⁹ *Id.* Attach. 1, ¶ 13. Although our discussion here has focused on the CDMA network, the Applicants intend to continue expanding the coverage and capacity of the iDEN network through 2007. These improvements should also reduce subscriber churn and thereby contribute to the merged company's lower costs of acquiring and retaining subscribers.

consists of more than 34,000 physical route miles of fiber optic cable, while the global network consists of over 75,000 route miles of fiber, including an ownership stake in major public undersea cable systems. The U.S. network is an integrated infrastructure based on Dense Wave Division Multiplexing (“DWDM”) and Synchronous Optical NETwork (“SONET”) backbone, while the global network is an integrated infrastructure that includes elements of Sprint’s wholly owned network and partner networks. These infrastructures support IP, ATM, Frame Relay, and TDM services with flexible mix-and-match architecture for smooth migration to future technology. In addition, Sprint has been developing integrated wireline/wireless products for its enterprise customers. Sprint Nextel will be able to offer both the Sprint wireline portfolio and the integrated solutions to Nextel’s base of business customers.

B. The Merger Will Enhance Sprint Nextel’s Incentive And Ability To Position Itself As A Strong Intermodal Competitor, Which Will Significantly Benefit Consumers.

With the wireless and wireline fiber assets described above herein and further below, Sprint Nextel will emerge from the proposed merger as a formidable competitive force with every incentive to optimize the wireless future.⁶⁰ Nextel and Sprint are industry-leading companies in technological innovations and data solutions. These differentiating characteristics will position the combined company as a strong and innovating competitor. The combined company will lack any material ILEC local wireline business restraint on its competitive strategy, and, with its wireless focus, Sprint Nextel will be a true competitive alternative to wireline local telephony. In contrast, the two largest providers of wireless services, Verizon

⁶⁰ See Sections I(B) and II(C)(3). Indeed, access to Sprint’s MANs will allow the merged company to bypass ILEC facilities in several areas of the country, thereby reducing the company’s access costs.

Wireless and Cingular, are motivated to develop wireless strategies, including the pricing and marketing of their wireless services, that will maximize the overall returns of their parent companies. As stated in the CRA Analysis:

Relative to an independent wireless provider, an ILEC-affiliated wireless provider has less incentive to lower wireless prices in areas in which it is the local exchange carrier. This is because lower wireless prices encourage some wireline customers to switch to wireless service, which reduces wireline profits.⁶¹

This inevitably includes consideration of potential adverse effects on the value of their parents' substantial ILEC operations.⁶²

Indeed, in assessing the competitive effects of Cingular's acquisition of AT&T Wireless, the Commission weighed the likely impact of that transaction on intermodal competition.⁶³ In its analysis, the Commission noted that Cingular's "strategies are influenced by SBC's and BellSouth's concerns about wireline revenues and access lines."⁶⁴ Given that Cingular was proposing to merge with the largest independent wireless carrier, AT&T Wireless, the Commission concluded that "[i]t is likely that Cingular's acquisition of AT&T Wireless will have some impact on the development of intermodal competition."⁶⁵ In contrast, the Sprint

⁶¹ CRA Analysis ¶ 69.

⁶² *Id.* ("Thus, an ILEC-affiliated wireless provider would only value the *incremental* profits associated with a wireline-to-wireless switch, whereas an unintegrated wireless provider would value the *total* profit from having a new subscriber to its wireless service.") (emphasis original). The CRA Analysis notes that this adverse incentive holds even if substitution between wireless and wireline is limited to secondary lines and the two products comprise distinct relevant antitrust markets. *See id.*

⁶³ *Cingular Order* ¶¶ 237-250.

⁶⁴ *Id.* ¶ 243.

⁶⁵ *Id.* ¶ 245.

Nextel merger will promote intermodal competition. Just four months ago in the *Cingular Order*, the Commission classified Sprint as an independent wireless carrier, stating:

[Sprint] operates as an incumbent LEC in a relatively small number of markets compared to its wireless footprint; it has significantly fewer local exchange access lines than wireless customers; and it derives a significantly larger portion of its revenues from its wireless operations than from its wireline operations. Sprint's local wireline operation has approximately 7.9 million access lines, whereas it has more than 20 million wireless subscribers.⁶⁶

In 2003, Sprint's wireline ILEC operations were \$6.1 billion out of \$26.2 billion – only 23.4% of its annual revenues. Nextel, meanwhile, has no incumbent wireline operations. The combined company will position its services as a competitive alternative to wireline service, to the benefit of intermodal competition and consumers.

The Commission has long recognized the benefits of intermodal competition and has worked to create a regulatory environment that promotes such competition. In 2002, the Commission pointed to mobile phone usage trends that indicated that some consumers are using their mobile phones as replacements for wireline service,⁶⁷ and it found that “as more consumers choose to use wireless instead of wireline services, the inability to transfer their wireline number to a wireless service provider may slow the adoption of wireless by those consumers that wish to keep the same telephone number they had with their wireline service provider.”⁶⁸ More recently,

⁶⁶ *Id.* n.556. Even more conclusively, upon closing of the planned spin-off of Sprint's ILEC operations, Sprint Nextel will have no ILEC properties.

⁶⁷ *See Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability, Memorandum Opinion and Order*, 17 FCC Rcd 14972 ¶ 17 (2002) (describing wireless-wireline substitution levels almost three years ago).

⁶⁸ *Id.* ¶ 18.

in the 2003 *Intermodal LNP Order*, the Commission reiterated that “[t]he focus of the [intermodal] porting rules is on promoting competition, rather than protecting individual competitors.”⁶⁹

In both the *Cingular Order* and the *Ninth CMRS Report*, the FCC noted that “intermodal competition is growing and wireless services may become a more significant direct competitor to wireline services for a larger portion of the mass market in the future.”⁷⁰ In the *Ninth CMRS Report*, the FCC acknowledged consumers’ growing tendency to substitute wireless service for wireline service. The Commission pointed to the “decrease in the number of residential access lines, a drop in long distance revenues, and a decline in payphone profits.”⁷¹

The proposed merger will further this trend. Sprint Nextel will have a greater ability to compete for business that historically has gone to wireline companies.⁷² Furthermore, as discussed below, the merger creates economies of scale and scope that will reduce costs and enable Sprint Nextel to offer a realistic, competitive alternative to a wider variety of customers.⁷³

⁶⁹ See *Telephone Number Portability, CTIA Petitions for Declaratory Ruling On Wireline – Wireless Porting Issues, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23697 ¶ 27 (2003) (subsequent history omitted); Chairman Powell further explained that the intermodal LNP rules would “eliminate impediments to competition between wireless and wireline services. Seamless wireline-to-wireless porting is another landmark on the path to full fledged facilities-based competition.” See *id.* at *Separate Statement* of Chairman Michael K. Powell.

⁷⁰ *Cingular Order* ¶ 241.

⁷¹ *Ninth CMRS Report* ¶ 213 (footnotes omitted).

⁷² Moreover, as discussed more completely in Section II(E) below, Sprint Nextel’s arrangements with other firms to offer second brand opportunities to use its networks also may compete with wireline offerings, further increasing intermodal competition.

⁷³ See also CRA Analysis ¶¶ 5-21.

C. The Proposed Merger Will Create Economies Of Scale And Scope That Will Make The Combined Company A More Effective Competitor.

In its consideration of the public interest benefits of a proposed merger, the FCC reviews “whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits to consumers that could not be pursued but for the combination.”⁷⁴ The FCC requires that the claimed public benefits be merger-specific and verifiable.⁷⁵ The proposed transaction will produce the following significant efficiencies: (1) improved technology development and deployment; (2) improved network coverage; (3) cost savings from using its own network for traffic currently carried on other carriers’ networks; (4) reduced equipment procurement costs; and (5) improved development of BRS spectrum services. In fact, as stated in the Montagner/Nielsen Declaration:

[a]fter accounting for the costs of integrating the two companies as well as other merger-related costs, we estimate that the Sprint Nextel merger will result in total net synergies of approximately \$12 billion on an after tax, net present value (“NPV”) basis (inclusive of terminal value).⁷⁶

The FCC has embraced economies of scale and scope like those demonstrated herein in its assessments of other transactions. For instance, the FCC found that the DirecTV/News Corp. merger was “likely to enable the merged entity to achieve certain economies of scale and scope, particularly in R&D, that absent the transaction the parties individually could not have

⁷⁴ *Cingular Order* ¶ 201.

⁷⁵ *See id.* ¶ 205.

⁷⁶ Joint Declaration of Marc Montagner and Steve Nielsen, Attachment D ¶ 5 (“Montagner/Nielsen Declaration”).

achieved.”⁷⁷ Similarly, the Commission found that the combination of AT&T Broadband and Comcast was “likely to result in synergies and efficiencies resulting in significant cost savings” and was likely to “have a positive impact on deployment of broadband services.”⁷⁸ The FCC also found that the combined entity’s increased size would “spur new investment.”⁷⁹ As the Commission explained:

“[t]he merged company should have a greater ability to spread those fixed costs across a larger customer base, which should in turn foster incentives for investment by the merged entity, as well as other businesses that seek to sell equipment, technology, and services to the merged entity.”⁸⁰

The Sprint Nextel merger will lead to similar public interest benefits. As a combined entity, Sprint Nextel will enjoy efficiencies of scale and scope that are expected to improve service quality and lower the cost of serving an additional wireless customer and providing an additional minute of wireless service. As a result, the merger will yield a stronger and more efficient wireless competitor.⁸¹ The FCC held in the *Cingular Order* that improved quality of service is a benefit that is “real to current and future consumers.”⁸² As a result, “better performance on the part of the combined entity has the potential to improve the competitiveness of the market as a whole” because competitors will be facing “a greater service-quality

⁷⁷ *DirecTV Order* ¶ 344.

⁷⁸ *AT&T-Comcast Order* ¶ 182.

⁷⁹ *Id.* ¶ 184.

⁸⁰ *Id.*

⁸¹ Montagner/Nielsen Declaration ¶ 7 (“[T]he estimated efficiencies resulting from the merger will enable Sprint Nextel to be more competitive in the future.”).

⁸² *Cingular Order* ¶ 212.

competitive challenge.”⁸³ Accordingly, improved performance by a combined Sprint and Nextel benefits all consumers, not just the current and future customers of Sprint Nextel.

Significantly, while the FCC found in the *Cingular Order* that Cingular and AT&T Wireless could remain separate entities and still fully realize some of their promised synergies,⁸⁴ this is not the case for Sprint and Nextel. As explained further below, Sprint and Nextel cannot achieve the synergies described herein as efficiently or effectively through such mechanisms as joint ventures or arm’s length contracts.

1. The Proposed Merger Will Lead To Demonstrably Improved Technology Development And Deployment.

As a direct result of the proposed merger, Sprint Nextel will realize significant cost savings in the development and distribution of new technologies, and consumers will gain access to new services and technologies that would not have been available from Sprint or Nextel operating alone. The Applicants will avoid cost duplication in their development and deployment of new technologies, and, with a larger customer base, they will be able to undertake projects that would have been uneconomical (*i.e.*, unprofitable) for either to pursue alone.⁸⁵

Absent the merger, Sprint and Nextel would separately pursue development and deployment efforts for more advanced technologies. Indeed, Sprint has been transitioning its network to advanced technologies, and Nextel was actively considering adding broadband data capability to its network using either a version of the CDMA standard or a next-generation,

⁸³ *Id.*

⁸⁴ *See, e.g., id.* ¶ 213 (“[A]t least some of the network improvements... could have been achieved through investment into Cingular’s network....”).

⁸⁵ CRA Analysis ¶¶ 18-19.

packet-switched mobile broadband technology.⁸⁶ Together, however, the Applicants anticipate that they will experience significant cost savings – a net present value of approximately \$4.8 billion – while upgrading their combined networks.⁸⁷ These cost savings will be realized largely because Nextel can avoid spending billions of dollars to augment its iDEN network with broadband data capability. Instead, Nextel will be able to rely on the investment Sprint already has made in connection with its own effort to upgrade its network. Similarly, Sprint will be able to avoid costs that Nextel already has incurred in developing its push-to-talk feature for CDMA by working with Qualcomm to develop QChat.⁸⁸

Sprint Nextel also will experience efficiencies in information technology and billing, customer care, and sales and marketing systems. The merged firm will be able to share future costs of developing innovations to these systems. In addition, the combined company will be able to take advantage of improvements that each firm already has made to these systems.⁸⁹ As

⁸⁶ Montagner/Nielsen Declaration ¶ 9.

⁸⁷ *Id.* ¶¶ 8-11.

⁸⁸ *See* Valente/West Declaration Attach. 2, ¶ 11.

⁸⁹ Sprint Nextel also will achieve savings from reduced handset costs and other equipment as a result of the merger. Montagner/Nielsen Declaration ¶ 25. “The combined entity will have increased purchasing volume, Nextel will have eliminated its primary-source dependence, and the worldwide volume of CDMA handsets will increase. All of these factors will combine to lower equipment costs to the benefit of consumers.” Valente/West Declaration ¶ 43. The FCC has previously held that savings from decreased per-unit costs for handsets is a specific public interest benefit of a merger. *SBC Communications, Inc. and BellSouth Corporation; For Consent to Transfer of Control or Assignment of Licenses and Authorizations, Memorandum Opinion and Order*, 15 FCC Rcd 2459 ¶¶ 47-48 (2000) (“*SBC/BellSouth Order*”). Reduced procurement costs for handsets is a merger-specific benefit as the Applicants could not achieve the results acting alone.

discussed in the Montagner/Nielsen Declaration, the Applicants estimate that the net present value of these savings to be \$4.4 billion.⁹⁰

The savings the Applicants will realize as a result of the merger could not be achieved absent the merger. It would take longer and be more costly for Nextel, on its own, to supplement its current iDEN network with a broadband wireless network. Similarly, it would be unprofitable for the Applicants to undertake certain research and development projects on their own. In contrast, if they can share the costs of developing and deploying new technologies and the expense of implementing improvements to information technology and billing, customer care, and sales and marketing systems, the Applicants will have greater incentive to invest in those areas. As a result, the merged firm will achieve technologies and system improvements that are superior and more cost-effective than those that either applicant could achieve alone. These cost reductions and improvements in quality and technology all will redound to the benefit of consumers. Not only will Sprint Nextel customers benefit, but competitors may be spurred to match the offerings of Sprint Nextel as well, to the benefit of their customers.

There is no other mechanism available to the Applicants that is likely to yield the same benefits as a merger. In order to remain independent competitors and at the same time share costs, the Parties would have to devise mutually agreeable, highly complex contracts.⁹¹ Such contracts are difficult to negotiate because of the complexity and unpredictability of many key contingencies.⁹² For example, the Parties would need to devise a formula whereby they allocate

⁹⁰ Montagner/Nielsen Declaration ¶¶ 23-25.

⁹¹ CRA Analysis ¶¶ 20-21.

⁹² *Id.* ¶ 22.

network costs, a point that is difficult to negotiate because it requires parties to agree on their relative benefits. In fact, Sprint and Nextel explored a joint effort to develop services for the BRS band; however, the Parties were unable to advance to a mutually agreeable arrangement.

Even if a contract can be reached between parties, not every issue that will arise thereafter can be easily remedied by the terms of the agreement. As a result, teaming arrangements can inevitably lead to disputes between parties, delaying the ultimate goals of the joint venture – to develop and deploy new and/or improved products and services.⁹³ Moreover, such delays increase the cost of new services and products for consumers.⁹⁴ Thus, there is no basis for concluding that Sprint and Nextel could achieve these cost savings through a joint venture.

2. Sprint Nextel Will Be Able To Provide Consumers Significantly Improved Network Coverage.

The customers of both companies will benefit from the fact that Sprint Nextel will have better service quality than the Applicants can currently offer as separate carriers. As described below, Sprint Nextel will be able to rationalize cell site coverage by reducing cell sites in some areas while filling coverage gaps in other areas with additional sites.⁹⁵ These factors will lead to improved signal strength and fewer dropped calls.⁹⁶

⁹³ *Id.* ¶ 23.

⁹⁴ *Id.* ¶ 22.

⁹⁵ CRA Analysis ¶¶ 26-29.

⁹⁶ *Id.* The Applicants estimate that this improved service quality will reduce subscriber churn. “We estimate that these service coverage and quality improvements will improve overall customer satisfaction and reduce the combined company’s customer churn rate.” Montagner/Nielsen Declaration ¶ 26. As such, the costs incurred by Sprint Nextel to acquire and retain subscribers also will decline.

Following the merger, Sprint Nextel will be able to streamline the population of cell sites currently maintained by the separate companies.⁹⁷ Sprint Nextel will do so by collocating a significant number of existing and planned Sprint cell sites on existing Nextel sites. Sprint Nextel is expected to collocate approximately 80% of its planned CDMA sites over the 2005-2008 time period into existing Nextel sites. This will reduce the cost of cell site deployment and ongoing cell site expenses for the merged firm. Indeed, “Sprint Nextel will realize savings from lower construction costs due to the ability of the combined company to house CDMA base station electronics in existing Nextel sites and to expand and enhance coverage while avoiding building additional cell towers.”⁹⁸ Also, the merger will allow the companies to take advantage of each entity’s network coverage in geographic areas where the other is not as developed, thereby avoiding the duplication of cell sites in those areas.

The proposed transaction will result in a significant improvement of the in-building availability of the CDMA network.⁹⁹ By adding CDMA facilities to Nextel’s existing cell sites, Sprint Nextel will be able to improve the quality of CDMA coverage, and consumers will quickly experience improved service quality, particularly inside buildings. As recognized in the *Cingular Order*, “[t]he increased effective capacity [of combining two companies’ spectrum positions] should enable the merged entity to make progress in reducing the number of blocked, dropped, and marginal calls currently experienced by [their] customers.”¹⁰⁰

⁹⁷ Montagner/Nielsen Declaration ¶ 12; *see also* CRA Analysis ¶ 29.

⁹⁸ Montagner/Nielsen Declaration ¶ 12.

⁹⁹ *Id.*

¹⁰⁰ *Cingular Order* ¶ 210.

These benefits cannot be achieved without the merger. While Sprint and Nextel have attempted to overcome their respective coverage limitations through a combination of cell site sharing and roaming agreements, these efforts are more costly, and produce fewer benefits, than can be achieved through the merger.¹⁰¹ First, cell site sharing can overcome some of the inefficiencies of serving areas with small numbers of subscribers, but such an approach “is often logistically difficult and, in any event, does not produce savings in equipment costs.”¹⁰² Second, roaming agreements are costly.¹⁰³ The FCC has found that roaming agreements are not as economical for a carrier as use of its own network facilities; the Commission has stated that a carrier’s facilities can generate marginal cost reductions that “are likely to benefit consumers through lower price and/or increased service.”¹⁰⁴ Sprint estimates that its per-minute cost for a roaming call is more than seven times the cost of a non-roaming call.¹⁰⁵ The merger will permit the combined firm to reduce these roaming costs, to the benefit of its subscribers and other consumers.

¹⁰¹ CRA Analysis ¶¶ 30-31. Indeed, Nextel has domestic, two-way roaming agreements only with Nextel Partners.

¹⁰² CRA Analysis ¶ 30.

¹⁰³ *Id.* ¶ 31.

¹⁰⁴ *Cingular Order* ¶ 219. See also *VoiceStream, Powertel, Deutsche Telekom Order* ¶ 121 (explaining that build-out and extension of VoiceStream’s network “nationwide and internationally, constitute[d] a clear, transaction-specific public interest benefit.” The FCC found that customers benefited from “potentially reduced roaming charges” in the United States and “from increased choices and competition in... international roaming services.”); *SBC/BellSouth Order* ¶ 48 (finding that “new service plans, new features, and reduced charges (including charges for roaming) to consumers will result from the expansion of these two regional wireless [carriers] into one national company”).

¹⁰⁵ CRA Analysis ¶ 31.

3. Sprint Nextel Will Achieve Considerable Cost Savings By Using Its Own Network For Traffic Currently Riding Over Other Carriers' Facilities.

Sprint's wireline facilities will permit Sprint Nextel to carry traffic more effectively and efficiently, reducing the need to secure transmission services from third parties. Sprint Nextel's ability to shift wireless traffic to its own wireline facilities in those areas where it is more efficient to do so will give the company significant flexibility and strength.¹⁰⁶

Following the proposed merger, a greater proportion of the minutes of service sold by Sprint Nextel will become "on-network." As a result, the combined company will be able to "avoid some of the interconnection charges that they currently pay to ILECs for completing calls that transit between the separate Sprint and Nextel networks."¹⁰⁷ Just as in the case of lower roaming costs, this reduction in interconnection charges should benefit consumers, since carriers can pass through such cost savings to consumers in the form of lower prices. Indeed, Messrs. Montagner and Nielsen state, "we expect that, post-closing, subscribers of the new company will be able to migrate toward more competitive rate plans offered by the combined company - a significant benefit to consumers."¹⁰⁸

Sprint has estimated that the per-minute cost of a call from one of its subscribers to someone off its network is approximately 19% greater than the per-minute cost of a call between

¹⁰⁶ See *2005 Wireless Outlook: Broadband Networks Arrive*, Rudy Baca, Precursor (Jan. 19, 2005) (Sprint's "wireline backbone increases the efficiency of the likely dual-band network....").

¹⁰⁷ CRA Analysis ¶ 32.

¹⁰⁸ Montagner/Nielsen Declaration ¶ 26.

two Sprint PCS subscribers.¹⁰⁹ After the merger, any call between Sprint Nextel customers will be on the merged company's network and will not need to be interconnected by an ILEC. Thus, the increase of on-network calls is a specific benefit related only to the merger and cannot be replicated by any other method. It would be extremely difficult to negotiate with ILECs for lower interconnection charges, especially with those ILECs who own competing wireless carriers.

Sprint Nextel will also experience a significant reduction in backhaul costs as a result of the merger. After the merger, a substantial proportion of Nextel's backhaul traffic will be shifted from facilities currently leased from other carriers to Sprint's wireline network.¹¹⁰ As discussed above, Sprint's wireline network is extensive and offers redundancy. Importantly, it includes Sprint-owned MANs in 30 markets across the United States. The MANs will enable Sprint Nextel to bypass much of the incumbent local exchange carriers' transport facilities in several areas of the country. Moreover, MANs extend SONET rings to ILEC end offices and PCS switches. As a result, MANs reduce access costs, provide access redundancy, and extend the reach of the network within the "last mile" of customers. As a result, the network can better serve local areas where service demand is high.¹¹¹

¹⁰⁹ CRA Analysis ¶ 33.

¹¹⁰ Montagner/Nielsen Declaration ¶ 21; CRA Analysis ¶ 39.

¹¹¹ In addition, the network is able to provide ubiquitous service availability using SONET throughout the U.S. network. There are 505 SONET rings in the core long distance network and 369 points of presence nationwide reaching all major markets in which all services are available.

The incremental cost of carrying Nextel's traffic on the Sprint wireline network is lower than the price currently paid by Nextel.¹¹² Such savings cannot be attained but for the proposed merger, since it is highly unlikely that Nextel on its own could realize a comparable cost reduction. While pricing inefficiencies sometimes can be eliminated in arms-length contracts, it is often difficult to do so in practice because usage of leased networks cannot be predicted accurately.¹¹³

D. The Sprint Nextel Merger Will Promote Development Of Wireless Interactive Multimedia Services.

One of the most significant public interest benefits produced by the Sprint Nextel merger involves the accelerated deployment of wireless interactive multimedia services using the 2.5 GHz band. As the Commission recognized when it changed the 2.5 GHz band plan, a great deal of effort will be required to realize the band's potential. Owing to their licenses and leases in the band, their experience in developing new services, their existing portfolio of wireless products, and their financial strength, Sprint and Nextel individually are well-positioned to address the challenges inherent in the FCC's new 2.5 GHz regulations. When these assets and capabilities are joined in the new Sprint Nextel, the result will be a company with greater expertise and incentive to make the 2.5 GHz spectrum fully productive.

The combination of Sprint's and Nextel's 2.5 GHz band spectrum, personnel, and expertise will bring significant public interest benefits. Nevertheless, the realization of these benefits will require substantial investment, development, research, trial, and business risk, largely because the technology is evolving, key standard-setting processes are still underway,

¹¹² CRA Analysis ¶ 39.

¹¹³ *Id.* ¶ 40.

and the regulatory environment that will govern the band remains unsettled in several critical respects.

While many elements of the business plan remain under development and subject to change, the goal of the combined company's nationwide service offering is to go beyond simply offering broadband access. The goal is to provide customers with integrated wireless solutions by incorporating devices, applications, and smart network technologies into an intuitive, easy-to-use service. This new service would generate economic growth and jobs in the United States by propelling the development of innovative applications and devices. The deployment of new wireless, interactive multimedia services has the potential not only to enrich the lives of millions of Americans through an enhanced, visual end-user experience, but also to increase productivity and reduce costs by providing the ability to access more information and more images simultaneously than ever before.

1. Past Regulatory Constraints And Inherent Spectrum Propagation Limitations Pose Obstacles To Using The 2.5 GHz Band.

The 2.5 GHz band remains saddled with a complicated assortment of incumbent licensees, each with different geographic areas, license holdings, and spectrum rights. As Commissioner Adelstein has observed, “[I]t is no secret that the BRS and ITFS services have had a tortured regulatory history.”¹¹⁴ The 2.5 GHz band, as Chairman Powell has noted, “has failed to emulate the success experienced by... other bands.”¹¹⁵ The Commission originally awarded licenses in this band to applicants on a channel-by-channel, site-by-site basis as an educational service and subscription television service in the 1960s and 1970s. The Commission divided the

¹¹⁴ *BRS Order*, Separate Statement of Commissioner Adelstein at 14384.

¹¹⁵ *BRS Order*, Separate Statement of Chairman Powell at 14380.

band among commercial Multipoint Distribution Service (“MDS”) and non-commercial Instructional Television Fixed Service (“ITFS”) licensees. The commercial and non-commercial operators envisioned a service that would transmit video programming to subscribers.

Based on the best technology available at the time, the Commission established a band plan that spaced channels within the band six megahertz apart and then interleaved different six-megahertz channels among the licensed channels. The rules effectively precluded any licensee from providing broadband service unless it sought and received consent from the licensee(s) of the interleaved channel group. Moreover, licensees often had to negotiate agreements with co-channel licensees in adjacent markets. These requirements hampered the ability of individual MDS and ITFS licensees to deploy data services. The interleaved nature of the 2.5 GHz band also thwarted deployment of more modern spread-spectrum techniques, which operate more efficiently and with less interference when licensees have access to large blocks of contiguous spectrum.

Beginning January 10, 2005, however, the Commission authorized “proponents” to commence a nearly five-year-long restructuring period for the 2496-2690 MHz band into upper- and lower-band segments for low-power operations, and a mid-band segment for high-power operations.¹¹⁶ The new band plan has created opportunities for spectrum-based systems or devices to migrate to compatible bands based on marketplace forces and has reduced the likelihood of interference caused by incompatible uses. The Commission has stated that the new band plan also could provide new incentives for the development of low-power, low-site broadband uses of the 2.5 GHz band, which the legacy band structure had previously thwarted.

¹¹⁶ The *BRS Order* also remains subject to pending petitions for reconsideration.

Despite these reforms, however, the Commission's decision has reaffirmed its longstanding prohibition of commercial ownership on the majority of the 2.5 GHz spectrum. Due to eligibility restrictions, approximately 120 MHz of this 2.5 GHz spectrum — approximately 62% of this band — remains ineligible for commercial licensing.¹¹⁷

Spectrum in the 2.5 GHz band also differs greatly from spectrum in the lower frequency bands. Other things being equal, the higher the frequency, the shorter the propagation distance of a radiofrequency signal. Several factors account for the diminished propagation paths of higher-frequency transmissions, including increased attenuation multipath fading and scintillation, tropospheric refraction and fading, and radio noise. The practical effect of these various factors, however, is simple: licensees that seek to deploy a low-site, low-power communications system must deploy more transmitters to cover the same area at 2.5 GHz than they would have to deploy at lower bands. Therefore, new entrants in the 2.5 GHz band must develop their own network deployment plans and either construct far more infrastructure than necessary in lower frequencies, or cover far less territory than consumers have come to expect. Moreover, the progressive weakening of radio signals in the 2.5 GHz band as they travel away from their point of origin limits the ability of signals to penetrate walls, floors, and ceilings in homes and offices. Also, from a purely technical perspective, the 2.5 GHz band suffers from not having a common technology that all providers use across the entire spectrum. Other factors notably absent from the 2.5 GHz spectrum include common control channels, standardized emission characteristics, and other common performance measurements. Collectively, these

¹¹⁷ Although there is the possibility of commercial control of EBS, it is fairly limited and does not affect this analysis of the eligible spectrum in the band.

regulatory and technical impediments create substantial challenges for any carrier to operate in the 2.5 GHz band.

2. With A Nationwide Footprint, Sprint Nextel Will Have The Spectrum Resources Necessary To Make Intensive Use Of The 2.5 GHz Band.

Sprint and Nextel face considerable expense, effort, and risk in developing and deploying high-speed wireless interactive multimedia services in the 2.5 GHz band. At sufficient scale, the 2.5 GHz spectrum holds the promise of providing consumers integrated broadband access to high-speed data, video-on-demand, and interactive delivery services. To overcome the technical and operational limitations inherent in the 2.5 GHz band, however, licensees must develop innovative, technically sophisticated uses of the spectrum that differ from the types of services that are offered in lower-frequency bands. A combined Sprint Nextel will prove able to overcome these impediments more successfully than either company acting alone by sharing assets, expertise, personnel, investments, and technology.

As noted in the Rowley/Finch Declaration, the Applicants intend to deploy wireless interactive multimedia services using the 2.5 GHz band spectrum. The Applicants anticipate that these services would be extraordinarily fast with initial average downlink throughput rates of 2 Mbps to 4 Mbps per carrier.¹¹⁸ Unlike CMRS offerings in the 800 MHz and 1.9 GHz bands, wireless interactive multimedia services over the 2.5 GHz band would be data-centric and focus on stationary and portable consumer electronic and computing-oriented devices and hardware. Wireless interactive multimedia services would enable consumers and business users to interact with high bandwidth applications through visual-centric services, such as video-on-demand, online gaming, document collaboration, and video conferencing. The Applicants would provide

¹¹⁸ Rowley/Finch Declaration ¶ 5.

service to a nearly nationwide footprint, including many rural areas, and would offer high-speed, low-latency access to high-quality multimedia content at reasonable prices through a nearly national, wide-area radio network. The new system would likely deploy an end-to-end, all IP, including quality of service and security safeguards, and streaming video applications with seamless integration into a wide array of consumer-electronic devices.

One of the principal benefits of the merger is the creation of a nearly nationwide footprint in the 2.5 GHz band. Sprint holds spectrum rights in the 2.5 GHz band in 190 BTAs (on average 26.8 MHz licensed and 57.7 MHz leased), and Nextel holds spectrum rights in this band in 281 BTAs (on average 35.7 MHz licensed and 53.7 MHz leased).¹¹⁹ Following the merger, Sprint Nextel's footprint in the 2.5 GHz band will extend to nearly 85% of the pops in the top 100 markets.¹²⁰ Significantly, technologies that would not have made economic sense for Sprint or Nextel to introduce regionally are more likely to be rolled out as part of a national network. Accordingly, consumers will have increased access to product offerings that would have likely been unavailable absent the merger, and they will receive better and more consistent service due to fewer coverage gaps. Essentially, the scale of their combined licenses and leases in the 2.5 GHz band significantly increases Sprint Nextel's ability to rapidly innovate and deploy new wireless interactive multimedia services.¹²¹

¹¹⁹ Sprint and Nextel lease 61.6% of the spectrum rights that they control within the BRS/EBS bands, many of which provide limited use rights.

¹²⁰ Rowley/Finch Declaration ¶ 13.

¹²¹ *SBC/BellSouth Order* ¶ 48 (finding that “the creation of another *national* wireless competitor constitutes a clear, transaction-specific public interest benefit. A significant percentage of mobile phone users desire nationwide access, and those users will benefit significantly from the creation of another competitor with a near-nationwide footprint.... Further, we find the Applicants’ arguments regarding cost savings have been reasonably

The proposed transaction also permits Sprint Nextel to construct a nationwide footprint in a more efficient fashion. To build national footprints individually, Sprint and Nextel would have been forced to acquire more spectrum through auctions, leases, or purchases. Because of the way this spectrum is licensed, this would have required an expensive piecemeal strategy with significant transaction costs. Through the merger, fewer costs will be passed on to consumers, allowing more Americans to take advantage of wireless interactive multimedia services.¹²²

At the same time, combining Sprint's and Nextel's spectrum holdings does not materially increase the companies' spectrum rights in any given market because the two companies generally do not hold licenses or leases in the same geographic areas.¹²³ Both Sprint and Nextel hold BRS or EBS licenses or leases in only eighty-five out of 493 BTAs nationwide. In other words, the merger does nothing to change the combined company's 2.5 GHz position in 408 BTAs. In most of the BTAs where both carriers have a presence, however, one carrier covers only a minimal percentage of the MHz-pops in that BTA. Indeed, within the eighty-five BTAs where both carriers have some type of presence, the combination results in an average increase of only 4.3 percentage points on a MHz-pops basis. In only seventeen of those eighty-five BTAs

justified, and therefore count among the public benefits of this transaction.”) (emphasis added).

¹²² The increased availability of wireless broadband to consumers brought about by the creation of Sprint Nextel will advance the Commission's clearly articulated goals. As Chairman Powell explained, “The wireless alternative will transform the marketplace by driving down the price of broadband services and expand access to underserved areas.” Michael K. Powell, Chairman, Federal Communications Commission, Remarks at the Wireless Communications Association International (June 3, 2004), *available at* http://www.fcc.gov/commissioners/powell/mkp_speeches_2004.html.

¹²³ Rowley/Finch Declaration ¶ 12.

will the merger increase the MHz-pops coverage of the combined entity by more than ten percentage points.

Moreover, spectrum in the 2.5 GHz band is encumbered, with approximately 62% of the band simply unavailable for commercial licensing. Because the Commission has maintained eligibility restrictions that prevent commercial operators from directly holding licenses for 120 MHz of the 2.5 GHz band (and even more in many major urban markets), system operators face significant transaction costs and risks associated with aggregating contiguous blocks of spectrum. In addition, while educators and non-profit institutions may choose to lease a portion of their licensed EBS spectrum to commercial operators, these leases are subject to Commission-mandated restrictions, and other businesses remain free to enter lease arrangements with individual educational institutions. Sprint Nextel will need to negotiate a large number of new leases with BRS and EBS license incumbents on the open market and must continuously negotiate renewals of existing leases that are already in place.

3. The Proposed Merger Will Lead To Improved Development Of Wireless Interactive Multimedia Services.

Sprint and Nextel will be able to combine their 2.5 GHz spectrum holdings to develop and deploy innovative high-speed data services. Because the geographic coverage of Sprint Nextel's 2.5 GHz operations will be larger than that of either of the merging parties, the merged firm will be able to offer services in the 2.5 GHz band to more consumers and, as a result, the investments made in the development of services in the band will tend to be more efficient.¹²⁴

¹²⁴ CRA Analysis ¶¶ 42-45.

Consequently, the investment incentives of Sprint Nextel will be greater together than if they developed the 2.5 GHz band separately.¹²⁵

In addition, as a result of the greater size of the network, there likely will be procurement savings in the merged entity's acquisition of network and subscriber equipment.¹²⁶ Also, suppliers of complementary services, such as application suppliers, are likely to find it more attractive to provide their products and services to Sprint Nextel than to either entity alone.¹²⁷ The expected result is that both the range and quality of services offered in the 2.5 GHz band will be improved due to the merger.¹²⁸

These synergies are only possible through the proposed merger. As described in the Rowley/Finch Declaration, Sprint and Nextel attempted to enter into a joint venture whereby they would develop and deploy new services in the BRS band.¹²⁹ However, the Parties were not able to advance to a mutually satisfactory arrangement. Indeed, these joint venture negotiations instead served to highlight for Sprint and Nextel the potential benefits of the proposed transaction.

¹²⁵ *Id.* ¶ 42.

¹²⁶ *Id.* ¶ 43.

¹²⁷ *Id.* ¶ 44.

¹²⁸ *Id.*

¹²⁹ Rowley/Finch Declaration ¶¶ 31-33.

4. The Proposed Merger Increases The Merged Company's Incentive To Undertake Aggressive Development And Ultimately Improves The Prospect That It Will Successfully Deploy Broadband Wireless Services In The 2.5 GHz Band.

By combining their BRS/EBS licenses and leases, Sprint and Nextel will be able to engage in more aggressive development efforts, in part because benefits will be realized over a larger customer base. Although the companies have not settled on a specific use for their BRS spectrum, the Applicants unilaterally have taken meaningful steps to recognize the band's potential.¹³⁰

Combining Sprint's and Nextel's assets provides the financial flexibility to pursue opportunities that could have been prohibitively costly or risky for each company individually. Innovation in this band will be risky and expensive. As demonstrated by the tortured, forty-year history of the BRS/EBS band, for every potential idea or offering that makes it successfully to the mass market, many others do not. More research and development risks, however, can be undertaken by merging Sprint's and Nextel's resources. Losses, such as Sprint's write-down of its investment in BRS to \$300 million in the third quarter of 2003, can be more easily spread across and absorbed by a larger entity. Moreover, it makes more sense for a combined Sprint Nextel to take these risks despite the possibility of incurring losses because the expanded customer base strengthens the possibility that Sprint Nextel will recoup research costs from new product offerings sooner.¹³¹ As the Commission explained in the merger of AT&T Broadband and Comcast, "[t]he merged company should have a greater ability to spread those fixed costs

¹³⁰ See *id.* ¶ 17.

¹³¹ See *DirecTV Order* ¶ 344 (finding that the merger would "likely... enable the merged entity to achieve certain economies of scale and scope, particularly in R&D, that absent the transaction the parties individually could not have achieved.").

across a larger customer base, which should in turn foster incentives for investment by the merged entity, as well as other businesses that seek to sell equipment, technology, and services to the merged entity.”¹³² The Sprint Nextel merger will lead to similar public interest benefits that would have not been possible with two independent entities.

5. The Parties’ BRS Activities Constitute A Cognizable Public Interest Benefit Notwithstanding The Indeterminate Nature Of BRS-produced Services.

At this time, services in the 2.5 GHz band are not sufficiently developed to subject them to antitrust review. The Commission should therefore accord similar treatment to BRS as it has given to other nascent technologies in the merger context. For example, in the *Cingular Order*, the FCC concluded that the market for stand-alone mobile data services was “not sufficiently developed at this time to [be] subject to a credible antitrust review.”¹³³ The Commission also noted that “Multipoint Distribution Service... spectrum does not currently meet [its criteria for spectrum suitable for provision of mobile telephony services] because it is committed to non-mobile telephony uses currently and for the near-term future.”¹³⁴ Similarly, in its analysis of the AT&T/MediaOne merger, the Commission concluded that the “nascent condition of the broadband industry” made it “premature to conclude that the proposed merger pose[d] a

¹³² *AT&T-Comcast Order* ¶ 184; see also *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 1962 ¶ 32 (2003) (In allowing Mobile Satellite Service (“MSS”) providers to utilize ancillary terrestrial components, the FCC explained that “larger customer bases could provide the opportunity to support larger production volumes and, therefore, lower costs for handsets and other equipment.”).

¹³³ *Cingular Order* ¶ 78.

¹³⁴ *Id.* n.283.

sufficient threat to competition and diversity in the provision of broadband Internet services, content, applications, or architecture to justify denial of the merger or the imposition of conditions.”¹³⁵ BRS presents an *a fortiori* case for “hands off” treatment: revised rules just became effective (and are subject to pending petitions for reconsideration), transition of the spectrum is just beginning, and proposed technologies are still in standards development.

Notwithstanding that the public interest benefits may not be realized for some time, the Commission previously has considered such benefits in its merger analysis. The Commission granted AT&T Wireless’ and Cingular’s application despite finding that many public interest benefits would be “challenging to achieve because of sizable technological and financial requirements and may therefore be realized only over the course of a number of years.”¹³⁶

E. The Proposed Merger Will Position Sprint Nextel As A Key Partner For Content Providers, Systems Integrators, And MVNOs.

Any comprehensive competition and public interest analysis of this merger must recognize the importance of Sprint, and post-merger Sprint Nextel, as a potential source of wireless and wireline inputs for other service providers. Such entities include content providers, systems integrators, MVNOs, and other telecommunications firms seeking to offer full portfolios of consumer services, including voice, data, video, wireline, and wireless, as well as customized enterprise applications and integrated solutions for businesses. According to the *Ninth CMRS Report*, the resale sector accounts for approximately six percent of all mobile telephony

¹³⁵ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, Memorandum Opinion and Order*, 15 FCC Rcd 9816 ¶ 123 (2000).

¹³⁶ *Cingular Order* ¶ 203.

subscribers.¹³⁷ In the *Cingular Order*, the Commission recognized the impact of resellers in the wireless marketplace, and it accounted for MVNOs and other resellers in its competitive analysis.¹³⁸

As the Commission is aware, Sprint has been a leader in providing other firms with “second brand” opportunities. Under such arrangements, firms use Sprint’s wireless and wireline networks to provide service to consumers under their own brand names (*i.e.*, “second brands”). In addition to the discussion of MVNOs that follows, Sprint has also utilized its wireline network and expertise to facilitate the entry of a number of large cable companies into the provision of wireline VoIP services.

In 2001, Virgin Mobile began offering service using Sprint’s wireless network in the U.S. Virgin Mobile markets its service as a pre-paid option for youths. “The young teen to 20-something crowd gravitates to Virgin Mobile’s no-nonsense approach to pricing and bills, says Howard Handler, chief marketing director.”¹³⁹ Virgin Mobile offers one pricing plan, with all fees and taxes rolled into the price.¹⁴⁰

In addition, Qwest offers its own wireless services to consumers using Sprint’s wireless network. ESPN also will soon market its own brand of wireless services that will include applications to attract their loyal viewers—sports enthusiasts. “[T]he company said it would

¹³⁷ See *Ninth CMRS Report* ¶ 38.

¹³⁸ See *Cingular Order* ¶ 92 (“We acknowledge, however, that non-facilities based service options have an impact in the marketplace and in some instances may provide additional constraints against anti-competitive behavior.”).

¹³⁹ *Id.*

¹⁴⁰ Martha McKay, *Rivals Could Join Virgin Mobile in Renting Space on Sprint’s Wireless Network*, *The Record* (New Jersey), Mar. 10, 2004.

offer postpaid voice services as well as sports news, information, commentary, analysis, statistics, ringtones, graphics, photos and logos, and streaming audio and video....”¹⁴¹ Moreover, some cable operators, such as Sunflower Broadband, also are offering wireless services using Sprint’s network, and on January 27, 2005, Time Warner Cable announced that it would begin a test-market sale of Sprint’s wireless services in March 2005.¹⁴² In June 2004, Sprint was recognized for being “among the leading suppliers of wholesale products and provisioning in an annual comparison study conducted by ATLANTIC-ACM, a Boston-based research and consulting firm.”¹⁴³

As of fourth quarter 2004, Sprint’s MVNOs had 3.7 million customers. Second brand opportunities such as those with MVNOs “[open] up a whole new arena for customer growth.”¹⁴⁴ According to the Precursor Group, MVNOs allow companies to:

get into the wireless game without the time delay and expense of first replicating a wireless network... [they] can become national players on day one. Because MVNOs do not own the spectrum or deploy and maintain the network infrastructure, capex and operating costs are minimal. Instead, MVNOs can concentrate on leveraging brand loyalty and cross selling other services or

¹⁴¹ Dan Meyer, *ESPN “Could Go All the Way” with Wireless MVNO Offering*, RCR Wireless News, Dec. 6, 2004, at 3.

¹⁴² Press Release, Sprint Corporation, Sprint, Sunflower Broadband Sign Agreement Enabling Sunflower Broadband to Offer Sprint PCS Services to Subscribers (March 19, 2004); David Hayes, *Time Warner Is Set to Sell Sprint Service*, Kansas City Star, Jan. 28, 2005.

¹⁴³ *Sprint Wholesale Products and Provisioning Among Leaders in Annual Industry Report Card*, Rednova News, June 8, 2004, available at www.rednova.com/news/display/?id=62858 (visited Feb. 4, 2005).

¹⁴⁴ Dan Meyer, *ESPN “Could Go All the Way” with Wireless MVNO Offering*, RCR Wireless News, Dec. 6, 2004, at 3.

products... or providing unique content... [and] need not have
expertise in communications....¹⁴⁵

The MVNO business model allows second brand firms to focus on sales, marketing, and customer service rather than on network operations. In turn, the underlying carrier can make more efficient use of its network and fixed operational costs. Indeed, analysts have noted that “Sprint’s increasingly successful MVNO operations have helped bolster its wireless operations and redefine its image.”¹⁴⁶ As such, “[p]ast arguments of whether MVNOs are valid and whether carriers just become dumb pipes seem to be disappearing.”¹⁴⁷ Customers are seeking customization, and MVNOs readily provide such customization, “appealing to [consumers’] senses of style.”¹⁴⁸ Indeed, Rutberg Research noted nearly universal support for MVNOs at the 2004 CTIA convention: “carriers and potential MVNO brands appeared, in our view, both confident and realistic on the opportunities for MVNOs.”¹⁴⁹ And Gary Forsee, Chairman and Chief Executive Officer of Sprint, was recognized as one of the best managers of 2004 by *BusinessWeek* because, in addition to other recent successes, Sprint’s successful MVNO agreements have added three million subscribers to Sprint’s wireless network.¹⁵⁰

As MVNOs take advantage of such technological upgrades in their own products and services, other underlying carriers will face additional competitive pressure to deploy their own

¹⁴⁵ Communications Daily, Wireless Section, June 1, 2004.

¹⁴⁶ Dan Meyer, *ESPN “Could Go All the Way” with Wireless MVNO Offering*, RCR Wireless News, Dec. 6, 2004, at 3.

¹⁴⁷ Tracy Ford, *The Fred Flintstone Phone*, RCR Wireless News, Apr. 5, 2004.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *The Best & Worst Managers of 2004 The Best Managers*, BusinessWeek, Jan. 10, 2005.

high-speed data networks more quickly.¹⁵¹ In commenting on Sprint's MVNO agreement with ESPN, Len Lauer, Sprint's President and Chief Operating Officer stated, "[w]e believe ESPN's involvement in wireless will help stimulate even further consumer demand for high-speed data services, capitalizing on the strength of Sprint's EV-DO strategy."¹⁵²

Thus, the merger will advance the availability of wireless service from MVNOs by including advanced services and functionality, to the benefit of consumers and competition. Moreover, to the extent the sale of wireless service to MVNOs and other packagers and content providers is deemed by the FCC to be a distinct antitrust market, the combination of Sprint and Nextel will not impede competition in any such market. First, Nextel is not a supplier of wholesale services so the combination of Sprint and Nextel does not increase concentration among existing suppliers, and, at a minimum, T-Mobile remains as a viable potential entrant. Moreover, the presence of retail competition, which is robust (*see* Section III) constrains the prices that can be charged at wholesale.¹⁵³

F. The Proposed Transaction Will Benefit Public Safety Communications.

1. Sprint And Nextel Both Have A Demonstrated Commitment To Providing High-Quality Services To The Public Safety Community.

Nextel and Sprint have each demonstrated a commitment to provide high-quality services to the public safety community. If the proposed combination is approved by the Commission, the merged company will move forward with an even stronger effort to develop wireless

¹⁵¹ See Dan Meyer, *Data Rollouts Will Lead to More Competition for Carriers, MVNOs*, RCR Wireless News, July, 5, 2004, at 1.

¹⁵² Dan Meyer, *supra* note 146, at 3.

¹⁵³ CRA Analysis ¶ 54.

products and services that public safety communicators can use to make all Americans more secure.

Nextel has a long and proud history of working closely with police, fire, emergency communications officials, and the rest of the public safety community. Nextel's iDEN network provides public safety entities with a reliable, interoperable communications system that complements dedicated public safety radio facilities, and with handsets that can withstand the challenging work environments faced by first responders and emergency personnel. In addition, Nextel has worked closely with public safety agencies to develop specific services and equipment that are tailored to the unique needs of the public safety community. Below are the key services and features that are available to Nextel's public safety customers:

- **Wireless Priority Service ("WPS")** – This nationwide service provides federal, state, and local public safety personnel and other authorized users with priority cellular service during emergencies. Such periods are typically marked by high call volumes and significant network congestion, and WPS dramatically improves cellular call completion rates for these users;
- **Priority Connect** – Analogous to WPS, Nextel's Priority Connect service enables public safety personnel to place Direct Connect calls ahead of other customers, increasing the likelihood that they will be connected during periods of network congestion;
- **Emergency Group Connect ("EGC")** – EGC enables public safety personnel to preempt other network traffic and enjoy instant and simultaneous contact among supervisors, squads, and mobile units, regardless of agency or jurisdiction;
- **Emergency Response Team ("ERT")** – Nextel's ERT provides wireless equipment, services, and support to public safety, emergency, and disaster recovery personnel during emergencies in urban and rural environments. Nextel ERT's specially-equipped trucks can be driven or airlifted to disaster recovery locations and special events to provide additional network capability, using satellite-based backhaul to Nextel's network; and
- **Interoperability Directory** – Nextel's Interoperability Directory is a secure, wireless, and online national directory of public officials that enables first

responders and law enforcement officers to quickly locate and communicate with other public safety personnel.

Sprint has made similar efforts to serve the public safety community. For more than 20 years, Sprint has delivered reliable telecommunications solutions to civilian and military agencies. Sprint has provided government agencies with integrated telecommunications solutions, including basic wireless, wireline, and advanced services. Sprint has provided accurate and reliable communications services to facilitate emergency preparedness, disaster recovery, and Homeland Security solutions. With such applications as “Sprint Collaboration Solutions” and “Sprint Emergency Preparedness Services,” public safety officials can manage emergency response and deployment, and first responders can in most circumstances confer and exchange information in real time. Through these services, specialized expertise and up-to-date information can be exchanged via voice, video, Web conferencing, and Internet-based, encrypted instant messaging.

The National Communications System (“NCS”), a federal government agency, has obtained funding for development and implementation of CDMA WPS, a portion of which will be utilized for Sprint to implement WPS. Sprint has submitted a proposal to the NCS prime contractor, Computer Sciences Corporation (“CSC”), to address Sprint's portion of this effort. Presuming Sprint’s proposal is accepted and funding made available, Sprint anticipates entering into a WPS subcontract with CSC mid-year, 2005. Implementation and deployment is anticipated to take approximately 18 months from signing of the subcontract.¹⁵⁴

¹⁵⁴ Sprint's implementation timelines are dependent on the switch vendors delivering their proposed WPS capabilities.

2. The Public Safety Community Will Benefit From The Greater Redundancy, Capacity, And Cost Efficiency Of Sprint Nextel's Networks.

The public safety community will benefit from numerous effects of the proposed combination of Sprint and Nextel, described in this Application and in the attached Declarations. Sprint Nextel will enjoy increased network reliability, capability, and redundancy, with a greater ability to maintain service to public safety customers in the event certain facilities are disabled or damaged in a crisis. In addition, with this more robust service footprint, public safety terminals operating over the combined company's network in an emergency may have longer battery lives, since these radios will likely be closer to a Sprint Nextel base station. Public safety agencies with limited budgets will also benefit from the greater economies of scale of the combined company.

Public safety users, like other customers, will also benefit from the greater range of products and services available to Sprint Nextel subscribers. In the short term, public safety users can utilize the network and functionalities that best suit their needs, and will eventually benefit from the development of multi-band handsets that can access both Sprint's CDMA network and Nextel's iDEN network. In the long term, the merged entity's expanded spectrum holdings will further the Commission's ongoing efforts "to promote... innovation in wireless broadband services in support of public safety."¹⁵⁵ With this greater bandwidth, including in the 2.5 GHz band, Sprint Nextel will be able to develop a variety of new wireless broadband applications and advanced communications capabilities for public safety users. These advanced

¹⁵⁵ See, e.g., *4.9 GHz Band Transferred from Federal Government Use, Memorandum Opinion and Order and Third Report and Order*, 18 FCC Rcd 9152 ¶ 2 (2003).

services will help ensure that agencies involved in the protection of life and property possess the communications resources needed to successfully carry out their Homeland Security mission.¹⁵⁶

G. The Combined Companies Will Move Forward With 800 MHz Spectrum Reconfiguration.

On August 6, 2004, the Commission released its Report and Order in its proceeding on “Improving Public Safety Communications in the 800 MHz Band” (“*800 MHz R&O*”).¹⁵⁷ In the *800 MHz R&O*, the Commission adopted long-term and short-term measures to address the unanticipated but worsening problem of interference to public safety communications in the 800 MHz band, interference that has resulted primarily from the growth of cellular operations in the 800 MHz band and in the nearby cellular A and B blocks. As the long-term approach to eliminating this interference, the Commission adopted a plan to reconfigure the 800 MHz band to separate public safety and other “high-site” licensees from Nextel’s spectrally incompatible Enhanced Specialized Mobile Radio (“ESMR”) and other CMRS systems in the 800 MHz band utilizing “low-site,” “high-density” cellularized architecture.¹⁵⁸ As the Commission recognized, the spectral proximity of these incompatible technologies is the root cause of this unacceptable public safety interference.¹⁵⁹ In addition, the Commission adopted technical standards defining unacceptable interference in the 800 MHz band and procedures that parties must follow to

¹⁵⁶ In addition, the merger will not affect Sprint’s and Nextel’s compliance activities regarding E911 and CALEA obligations and may, in fact, further their respective efforts in those important areas.

¹⁵⁷ See generally *800 MHz R&O*, *supra* note 23.

¹⁵⁸ *Id.* ¶¶ 2-3.

¹⁵⁹ *Id.* ¶ 2.

mitigate this interference.¹⁶⁰ On December 22, 2004, the Commission adopted and released a “Supplemental Order and Order on Reconsideration” that clarified and modified the *800 MHz R&O* in order to promote a more efficient and equitable spectrum reconfiguration plan for the 800 MHz band.¹⁶¹

Pursuant to the *800 MHz R&O*, Nextel accepted the modification of its licenses on February 7, 2005.¹⁶² Thus, Nextel is ultimately required to return to the Commission all of its 800 MHz band spectrum holdings below 817/862 MHz, as well as all of its existing authorizations in the 700 MHz Guard Band.¹⁶³ In the 800 MHz band, Nextel must relinquish an average of 4.5 megahertz of spectrum per market—frequencies that will be made available for public safety use. Nextel also will bear financial responsibility for the full cost of retuning all 800 MHz band public safety systems and other private wireless 800 MHz band incumbents to their new spectrum assignments with comparable facilities.¹⁶⁴

In return for Nextel’s billions of dollars worth of spectral and financial contributions to this band reconfiguration, the Commission will modify Nextel’s CMRS licenses to authorize it to operate in ten megahertz of contiguous spectrum at 1910-1915/1990-1995 MHz.¹⁶⁵ In

¹⁶⁰ *Id.* ¶ 3.

¹⁶¹ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels, Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, FCC 04-294 (rel. Dec. 22, 2004).

¹⁶² *800 MHz R&O* ¶ 342.

¹⁶³ *See, e.g., id.* ¶¶ 11-12.

¹⁶⁴ *See, e.g., id.* ¶ 11.

¹⁶⁵ *Id.* ¶ 211.

conjunction with its assignment to this replacement spectrum, Nextel must reimburse UTAM Inc. for the cost of clearing the 1910-1915 MHz band and fund the clearing of broadcast auxiliary service (“BAS”) incumbents from the 1990-2025 MHz band.¹⁶⁶ At the conclusion of 800 MHz band reconfiguration, Nextel must pay to the U.S. Treasury any difference between the value of the 1.9 GHz band spectrum rights (determined by the Commission to be \$4.86 billion) and the value of its returned spectrum at 800 MHz plus its costs incurred in reconfiguring the 800 MHz band and clearing the 1.9 GHz band.¹⁶⁷

Nextel has worked for years towards a comprehensive solution to 800 MHz public safety interference, and the *800 MHz R&O* incorporates essential elements of a proposal developed and submitted to the Commission by Nextel, the major public safety organizations, and various private wireless organizations.¹⁶⁸ If the proposed merger is approved, the combined company will maintain this strong commitment to address public safety interference in the 800 MHz band. As specified in the Merger Agreement for this transaction, the merged company will accept the obligations enumerated in these conditions.¹⁶⁹ Sprint Nextel will move forward expeditiously with the implementation of the Commission’s 800 MHz band reconfiguration process.

¹⁶⁶ *Id.* ¶¶ 244, 252.

¹⁶⁷ *Id.* ¶ 329.

¹⁶⁸ *See, e.g.*, Reply Comments of the Industrial Telecommunications Association, Inc., *et al.* (the “Consensus Parties”), WT Docket No. 02-55 (Aug. 7, 2002) (“Consensus Plan”).

¹⁶⁹ Sprint Corporation, Form 8K-Exhibit 2, § 6.12 (Securities and Exchange Commission, Dec. 15, 2004), Attachment A.

III. THE PROPOSED TRANSACTION WILL PROMOTE COMPETITION.

As demonstrated in Section II, the proposed transaction will promote competition in mobile telephony markets as it will allow Sprint and Nextel to build on their strengths and provide better services at lower costs to consumers and provision advanced services faster than they would be able to accomplish individually. It is equally true that the merger of Sprint and Nextel will not result in adverse competitive effects, either by increasing Sprint Nextel's unilateral incentive to raise prices or by increasing the likelihood of coordinated behavior among wireless carriers, as demonstrated in the CRA Analysis.

A. The Mobile Telephony Industry Is And Will Remain Competitive.

Competition in the mobile telephony industry in the United States is vigorous and dynamic and will remain so after consummation of the proposed transaction. In its Ninth Report on the status of competition in mobile telephony markets released in September 2004, the FCC concluded that there is effective competition, noting that "competition is robust in terms of the current number of competitors per market, and also that spectrum availability and other key determinants of entry conditions are favorable to continued competitive entry at the local level."¹⁷⁰ The FCC further stated that mobile carriers continue to compete on price and use innovative pricing plans and service offerings to compete with one another and that consumers freely switch providers in response to carriers' price and service differences.¹⁷¹ Likewise, in the *Cingular Order* the FCC stated:

Average revenue per minute, a proxy for mobile telephony pricing, declined from 47 cents in 1994 to 10 cents in 2003. By all

¹⁷⁰ *Ninth CMRS Report* ¶ 2.

¹⁷¹ *Id.* ¶¶ 3-4.

indications, lower prices have stimulated rapid growth in the demand for mobile telephony services. The number of mobile telephony subscribers has grown nearly fivefold from almost 34 million at the end of 1995 to approximately 160 million at the end of 2003, and annual service revenues have more than quadrupled from \$19 billion to \$87 billion in the same period. Mobile penetration reached and then surpassed 50 percent of the population in 2003, up from just 25 percent at the end of 1998, and is forecast to continue rising significantly over the next five years. On average, U.S. mobile telephony subscribers talk on their mobile phones in excess of 500 minutes per month, more than three times as much as mobile subscribers in Western Europe and Japan.¹⁷²

Thus, it is evident that mobile telephony markets in the U.S. are robust.

Moreover, the transaction will not impede new carriers from entering local markets to compete. As noted in its *Ninth CMRS Report*, the FCC has implemented policies to promote a more flexible licensing approach to allow “market forces to determine the number of competitors in a given geographic area.”¹⁷³ These policies include, for example, the FCC’s secondary markets policy,¹⁷⁴ its partitioning and disaggregation policies, and its Auction No. 58 that is now underway and makes available 242 broadband PCS licenses that had been previously cancelled or terminated.¹⁷⁵ These licensing policies, among others, promote easier entry into mobile telephony markets and led the FCC to conclude in its *Ninth CMRS Report* that overall entry conditions are favorable for competitive entry.¹⁷⁶ The proposed transaction will not impede other carriers from entering mobile telephony markets.

¹⁷² *Cingular Order* ¶ 67 (footnotes omitted).

¹⁷³ *Ninth CMRS Report* ¶ 82.

¹⁷⁴ *Id.* ¶¶ 84-85.

¹⁷⁵ *See id.* ¶ 81.

¹⁷⁶ *Id.* ¶ 3.

Furthermore, the transaction will not diminish the ability of other carriers to compete based on price or services offered. And there is no indication that consumers' ability to switch to other carriers in response to competitive forces will be reduced. The FCC found in its *Ninth CMRS Report* that mobile carriers report that consumer churn rates vary between 1.5 and 3.5 percent per month, and one 2003 study found that 26% of wireless subscribers said they had switched carriers at least once in a 12-month period.¹⁷⁷ Moreover, with the implementation of wireless local number portability, competitive pressures to retain existing customers have increased. The FCC has noted that carriers have launched aggressive customer retention efforts, including, for example, offering existing subscribers better deals (*i.e.*, upgrades) previously used only in efforts to win new customers.¹⁷⁸

After the transaction, there will continue to be four nationwide mobile carriers, as well as a substantial number of MVNOs and regional and local providers from which consumers will be able to choose to take their wireless service. This transaction will not hinder consumers from continuing to select the mobile carrier that offers them the best price and service. Moreover, industry analysts and observers do not expect this transaction to result in higher prices to consumers. Forrester Research analyst Lisa Pierce stated, "Sprint has always been pretty aggressive on wireless service prices, both business and consumer... I don't expect it to reverse course."¹⁷⁹ In addition, a Forrester Research, Inc. report on the merger states that mobile prices

¹⁷⁷ *Ninth CMRS Report* ¶ 161.

¹⁷⁸ *Id.* ¶¶ 165-166.

¹⁷⁹ Ellen Simon, *Wireless Rivalry; A Union Between Sprint and Nextel Would Cement Company As the No. 3 Mobile-Phone Operator*, The Miami Herald, at F1 (Dec. 16, 2004).

for enterprises will “remain flat-to-down” and that “the impact on consumer pricing will be negligible.”¹⁸⁰ Similarly, Michael Bowen an analyst at Friedman, Billings, Ramsey Group Inc. wrote, “[w]e believe a potential combination could actually heighten competition in the sector by making a Nextel-Sprint combination more competitive, from a scale standpoint, with Cingular and Verizon Wireless.”¹⁸¹

B. A Quantitative Competition Analysis Of The Proposed Transaction Demonstrates That There Is No Significant Risk Of Anticompetitive Effects.

1. Relevant Product Market.

In the *Cingular Order*, the FCC used the hypothetical monopolist test to determine the relevant product markets for analyzing the transaction.¹⁸² The hypothetical monopolist test identifies “the smallest group of competing products or services for which a hypothetical monopolist in a geographic area could profitably impose at least a ‘small but significant and non-transitory price increase,’ presuming no change in the terms of sale of other products.”¹⁸³ Thus,

¹⁸⁰ Charles S. Golvin, et. al., Forrester Research, Inc., *Sprint and Nextel Tie The Knot: Inviting Customers to Cut the Cord*, at 4 (Dec. 17, 2004).

¹⁸¹ Ben White & Ellen McCarthy, *Nextel, Sprint Close to Merger; Cell-Phone Firms Have Tentative Deal*, Washington Post, at A01 (Dec. 11, 2004).

¹⁸² *Cingular Order* ¶ 73.

¹⁸³ *Id.* ¶ 71, citing United States Dep’t of Justice and Fed. Trade Comm’n 1992 Horizontal Merger Guidelines, 57 FR 41552 (1992); United States Dep’t of Justice and Fed. Trade Comm’n Revision to the Horizontal Merger Guidelines (Apr. 8, 1997), §§ 1.11, 1.12, available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>; Gregory Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253 (2003).

the relevant product market includes “all products ‘reasonably interchangeable by consumers for the same purposes.’”¹⁸⁴

Employing the hypothetical monopolist test in the *Cingular Order*, the FCC found separate product markets for interconnected mobile voice¹⁸⁵ and mobile data services¹⁸⁶ and also for residential and enterprise subscribers; however, it did not distinguish mobile data subscribers from mobile voice subscribers or enterprise subscribers from residential subscribers in its analysis. Instead, the FCC analyzed all of the separate product markets under a combined product market of “mobile telephony services.”¹⁸⁷ We follow the FCC’s “mobile telephony services” definition of the relevant product market to analyze the proposed transaction.¹⁸⁸

¹⁸⁴ *Id. citing United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *see also United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001) (in determining what is a reasonable substitute, the court excluded “middleware” software from the definition of the relevant product market because of its present non-interchangeability with Windows, despite its future long-term potential); and *In re Wireless Telephone Services Antitrust Litigation*, 2003 WL 21012603 at 9 (S.D.N.Y. 2003) (relevant product market “consists of products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered.”).

¹⁸⁵ The FCC defines mobile voice as “all commercially available two-way mobile voice services, providing access to the public switched telephone network via mobile communications devices employing radiowave technology to transmit calls.” *Cingular Order* at n.268, *citing Ninth CMRS Report* ¶ 32.

¹⁸⁶ The FCC defines mobile data service as “the delivery of non-voice information to a mobile device.” “Data services available today include, but are not limited to, short messaging service, email, and access to the internet.” *Id.* at n.269, *citing Ninth CMRS Report* ¶ 33.

¹⁸⁷ The FCC found that it is probable that most mobile data services are sold as additions to mobile voice services. Thus, a combined analysis is “very unlikely to understate potential competitive harm to the market for mobile data services.” *Cingular Order* ¶ 77. Moreover, the FCC found that stand-alone mobile data products, such as PDAs, are nascent and “not sufficiently developed at this time to [be] subject to a credible antitrust review.” *Id.* ¶ 78. Likewise, the FCC stated that due to the fact enterprise customers tend

2. Relevant Geographic Market.

In the *Cingular Order*, the FCC stated that the Supreme Court defines a relevant geographic market “as the area of effective competition to which purchasers can practicably turn for services.”¹⁸⁹ Furthermore, it stated that economic literature commonly defines the relevant geographic market “as the region in which a hypothetical monopolist that is the only producer of the relevant product or service in the region could profitably impose at least a ‘small but significant nontransitory’ increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change.”¹⁹⁰

The FCC determined that the relevant geographic market for mobile telephony services is local. In doing so, it found that consumers purchase their mobile telephony service on a local basis (versus traveling across the country); that they prefer local phone numbers; and that wireless carriers market their services differently in local areas, such as by offering specials and discounts.¹⁹¹ The FCC also declined to define the local geographic market as a single county. While recognizing that all local geographic markets are unique, it found that it would likely be

to be high-volume users, competition among the carriers for these customers is “likely to be relatively intense.” Thus, it did not believe that an analysis based on combined residential and enterprise customers was likely to “understate potential competitive harm to the market for enterprise services.” *Id.* ¶ 79.

¹⁸⁸ Nonetheless, the Parties respectfully decline to endorse the FCC’s relevant product market definition in the *Cingular Order*.

¹⁸⁹ *Cingular Order* ¶ 82 n.284, citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963).

¹⁹⁰ *Id.* ¶ 82, n.285, citing DOJ/FTC Merger Guidelines § 1.21.

¹⁹¹ *Id.* ¶ 87.

unprofitable for the hypothetical monopolist to increase prices in a particular county, as consumers could travel to a nearby county to obtain an identical service at a lower price.¹⁹²

For this reason, the Parties use the local geographic area as the relevant geographic market to analyze the proposed transaction.¹⁹³

3. Structural Concentration Analysis.

In the *Cingular Order*, the FCC analyzed the likelihood of unilateral anticompetitive harm to CMRS competition in local markets by first employing structural market concentration “screens” to determine which, if any, local markets require further analysis. Markets that exceeded the screen thresholds were not presumed to suffer competitive harm caused by the transaction; rather, these markets were examined more closely, and the vast majority of markets that were subjected to more extensive analysis were ultimately found to raise no significant concern of harm to competition as a result of the merger. Two of the screens used by the FCC were based upon Herfindahl-Hirschman Index (“HHI”) calculations for each local market. HHIs are measurements of market concentration calculated by squaring the market share of each participant in the market and then summing the results of those calculations. The higher the HHI, the more concentrated the market. The first screen used by the FCC in the *Cingular Order* identified markets where the post-merger HHI equaled or exceeded 2800 and the increase in HHI as a result of the merger (the “delta”) equaled or exceeded 100 points. The second screen identified local markets where the HHI delta equaled or exceeded 250.¹⁹⁴ The third screen

¹⁹² *Id.* ¶ 90.

¹⁹³ Nonetheless, the Parties respectfully decline to endorse the FCC’s relevant geographic market definition in the *Cingular Order*.

¹⁹⁴ *See Cingular Order* ¶ 106.

identified markets where the merging parties would hold at least 70 MHz of wireless spectrum after the merger.¹⁹⁵

The CRA Analysis follows the FCC’s analysis in the *Cingular Order*, modified as appropriate to reflect the circumstances of this transaction.¹⁹⁶ The parties to this transaction have analyzed data prepared by Telephia for 235 local markets (defined by Telephia) because they do not have access to the Numbering Resource Utilization/Forecast (“NRUF”) data or the carrier billing data submitted in response to a staff data request for the AWE/Cingular proceeding. Of the 235 markets analyzed, 102 are based on consumer surveys conducted on a regular basis by Telephia for its TABS database; market shares for the remaining 133 “snapshot” markets are estimated by Telephia using surveys on an occasional basis.¹⁹⁷

Note at the outset that the FCC’s third structural screen, CMRS spectrum in excess of 70 MHz, or approximately one-third of all presently allocated CMRS spectrum, is not exceeded in any geographic area where Sprint and Nextel hold spectrum; indeed, Sprint Nextel will have

¹⁹⁵ See *id.* ¶¶ 106, 109 (“[A]lthough 70 MHz represents a little more than one-third of the total bandwidth available for mobile telephony today, we emphasize that a market may contain more than three viable competitors even where one entity controls this amount of spectrum, because many carriers are competing successfully with far lower amounts of bandwidth today... Nevertheless, in line with the conservative approach embodied in this initial screen, the function of which was simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of this transaction, we subjected to further review any market in which one entity controls more than one-third of this critical input.”).

¹⁹⁶ Note that the CRA Analysis is preliminary in nature and necessarily dependent on the incomplete data available to the Applicants at this time.

¹⁹⁷ Telephia makes its data available on a commercial basis. The Applicants each purchased the Telephia data for the purpose of conducting this economic analysis. As the data are proprietary to Telephia, the proprietary or confidential data underlying the CRA analysis has been redacted from the public version of this filing and will be made available subject to the protective order for this proceeding once it is adopted.

more than 60 MHz in only one geographic area, Hawaii.¹⁹⁸ The fact that this structural screen is not exceeded in any market indicates not only that no market warrants further review on this basis, but, as further discussed below, also is a telling indication of the availability of additional capacity for competitive responses by rivals to any hypothetical effort by Sprint Nextel to raise its prices.

The CRA Analysis determined that 95 out of 235 Telephia markets would be identified by the structural screens used by the FCC in the *Cingular Order*.¹⁹⁹ However, the structural screens used in the *Cingular Order* likely overstate the number of markets that warrant further analysis in this case. This is so for three reasons: (1) Nextel is not an ILEC, and the Commission itself regards Sprint as an “independent” wireless carrier; (2) as noted above, Sprint and Nextel will generally have less CMRS spectrum than post-merger Cingular; and (3) the proposed merger presents more credible efficiency benefits than did the Cingular/AT&T Wireless merger.²⁰⁰ As stated in the CRA Analysis, “[t]hese three factors predictably lower the

¹⁹⁸ See CRA Analysis, Table 2. See also Combined Spectrum Post-800 MHz Rebanding (“Attachment I”). While the CRA Analysis only examined spectrum holdings for Telephia markets, the statement above is accurate with respect to all geographic areas in the U.S., as shown in Attachment J. The spectrum calculations discussed in this paragraph and shown in Table 2 of the CRA Analysis assume that the proposed band reconfiguration has taken place and that Nextel retains 14 MHz in the 800 MHz band, which likely overstates Nextel’s post-reconfiguration holdings across the U.S. The calculations also treat Nextel Partners’ spectrum as if it were Nextel’s. Thus, it is actually an overstatement of the spectrum position of the combined companies. Note that the spectrum amounts used in the CRA Analysis were provided by the Parties, not Telephia. The spectrum amounts provided by the Parties were “mapped” by CRA into a Telephia market. See CRA Analysis ¶ 65 n.36.

¹⁹⁹ Table 2 to the CRA Analysis lists the markets where the post-merger HHI exceeds 2800 and the delta is at least 100. It also identifies the additional markets where the HHI delta is at least 250.

²⁰⁰ CRA Analysis ¶ 66.

competitive risks raised by the Sprint-Nextel merger as compared to the Cingular-AT&T Wireless transaction. This suggests that the Commission should evaluate the Sprint-Nextel merger with more permissive initial structural screens.”²⁰¹

The point that Sprint and Nextel are not major ILECs is consistent with the Applicants’ showing in Section II(B) above that the proposed transaction will actually promote intermodal competition. As described in the CRA Analysis, a wireless carrier with substantial ILEC operations has less incentive to lower wireless prices in its ILEC service area to avoid cannibalizing its wireline revenues, and a concomitant incentive to raise wireline prices. A wireless carrier with substantial ILEC facilities also has the incentive and opportunity to delay, deny, and degrade inputs such as access and interconnection to rival wireless carriers.²⁰² Neither Sprint nor Nextel has significant ILEC assets;²⁰³ Nextel in fact has none, and the combined company plans to spin off Sprint’s existing ILEC operations. Moreover, as noted above, the FCC today regards Sprint as an independent mobile telephony provider. In short, the FCC’s concern in the *Cingular Order* that the Cingular/AT&T Wireless merger would remove an independent wireless carrier (AT&T Wireless) from the market²⁰⁴ by combining it with a

²⁰¹ *Id.* ¶ 67 (footnote omitted). Note also that the fact that the proposed transaction reduces the number of national carriers from 5 to 4, or the number of carriers in any local market where Sprint and Nextel presently provide service by one, does not justify analyzing the proposed transaction under more stringent HHI screens. *See id.* at n.37.

²⁰² *See id.* ¶¶ 68-74.

²⁰³ The FCC determined very recently that Sprint is an independent wireless carrier. *Cingular Order* ¶ 237, n.556.

²⁰⁴ *See id.* ¶¶ 243-245.

predominantly wireline carrier (Cingular, owned by SBC and BellSouth) simply does not apply here.

As noted above, the combination of Sprint and Nextel yields no geographic area in which the combined firm will hold more than 70 MHz of CMRS spectrum, even if spectrum held by Nextel Partners is attributed to the combined company.²⁰⁵ Excluding the spectrum held by Nextel Partners, the combined company will have no more than 60 MHz in any geographic area. Indeed, in many areas the combined company will have only 30-50 MHz. In most of the geographic areas of the U.S., Sprint Nextel will have 50-60 MHz.²⁰⁶ The Cingular/AT&T Wireless merger resulted in a wireless provider with far larger spectrum holdings with more than 60 MHz in 41 of the top 106 Telephia geographic areas for which spectrum holdings data was available.²⁰⁷ Thus, the Cingular/AT&T Wireless merger presented a greater risk that rivals would lack the necessary capacity to respond to a price increase by the merged firm.

Finally, the CRA Analysis states that “[i]n any merger, the overall consumer impact depends on the relative magnitudes and likelihoods of anticompetitive harms and procompetitive benefits” of a proposed transaction.²⁰⁸ Thus, if the Sprint Nextel merger generally has more substantial benefits than the Cingular/AT&T Wireless merger, the Commission can safely reduce the number of markets it examines in greater detail by relaxing the structural screens. In the *Cingular Order*, the FCC did not give substantial weight to the cost-saving claims put forward

²⁰⁵ See CRA Analysis, Table 2; and Attachment J.

²⁰⁶ As noted, these estimates take into account Nextel’s acceptance of the terms of the Commission’s *800 MHz R&O*.

²⁰⁷ CRA Analysis ¶ 75.

²⁰⁸ *Id.* ¶ 77.

by Cingular and AT&T.²⁰⁹ As demonstrated in Section II(C) above, the FCC would be justified in doing so here.²¹⁰

The CRA Analysis indicates that if the HHI screens were relaxed by only 10% based on this analysis (i.e., setting the screen to identify HHIs of 3080 or more with deltas equal to or exceeding 110, or a 275 HHI delta regardless of the overall HHI level), then the number of Telephia markets that the screens would indicate require further analysis is reduced to 79. However, whether one uses the screens set in the *Cingular Order* or the screens modified to fit the competitive *milieu* of this transaction, a closer examination of the markets identified in the screens reveals no significant risk of unilateral or coordinated effects.

4. The Proposed Transaction Poses No Significant Risk Of Anticompetitive Unilateral Effects.

The *Cingular Order* concluded that wireless service is a differentiated product and followed the *Merger Guidelines* for analyzing unilateral effects for such product markets, which basically involves an inquiry as to whether the merged company has the incentive and ability to unilaterally raise its price after the merger. The CRA Analysis follows that basic framework.

As noted in the CRA Analysis, the most extreme risk of adverse unilateral effects arises when the merged firm becomes the leading firm in a particular market by a large margin. This is generally not the case for this transaction in the Telephia local markets; Sprint Nextel would have a market share exceeding 50% in only one market, whereas Cingular and AT&T Wireless

²⁰⁹ See *Cingular Order* ¶ 232.

²¹⁰ See also CRA Analysis ¶¶ 47-82.

had a combined subscriber share of more than 50% in 30 Telephia markets.²¹¹ Consequently, the risk of anticompetitive unilateral effects from the proposed transaction is slight.

In any event, the incentive to unilaterally increase price is reduced if: (1) rivals have the ability to reposition and expand output in response to a price increase; (2) Sprint and Nextel are not each other's closest substitutes; and (3) efficiencies from the merger result in significant reductions in variable costs, which creates an incentive for the merged carrier to reduce prices. All three of these factors are present in this merger.

A key factor in the FCC's competition analysis in the *Cingular Order* was the ability of rivals to absorb in the near term ten percent of the merged firm's subscribers in the event of a post-merger price increase.²¹² First, as noted in the CRA Analysis, because post-merger Cingular has a larger market share than will Sprint Nextel in many markets, in an *a priori* sense in most local markets it will be easier for rivals to absorb 10% of Sprint Nextel's market share than it would be to absorb 10% of the post-merger Cingular's market share.²¹³ This analysis is buttressed by the fact that Sprint Nextel's spectrum local holdings will be generally smaller than post-merger Cingular's.²¹⁴

The CRA Analysis estimates the ability of competitors to absorb additional subscribers in each local Telephia market identified by one of the screens by calculating their "Subscriber

²¹¹ See CRA Analysis ¶ 85, and Table 5.

²¹² See *Cingular Order* ¶ 136. See also *id.* ¶ 134 ("[W]here a firm is already present in a market, has comparable service coverage, and has excess capacity relative to its current subscriber base, it should be able to adjust rates, plan features, handsets, advertising, etc., in the short run.") (footnote omitted).

²¹³ See CRA Analysis ¶¶ 112-115 and Table 11.

²¹⁴ See *id.*

Absorption Capacity” (“SAC”). Relying on conservative assumptions and subject to numerous caveats described in the CRA Analysis,²¹⁵ the SAC was derived by calculating the maximum number of subscriber share points that can be supported with one share point of spectrum in a given geographic area. This maximum is assumed to be that of the major wireless carrier with the largest subscriber share relative to its spectrum share.²¹⁶ That “maximum” subscriber capacity was then applied to every firm in the market to estimate the number of subscriber share points that competitors of Sprint Nextel could support in the event of a hypothetical price increase.

The CRA SAC analysis demonstrates that, with one exception, for all of the Telephia markets identified in either the *Cingular Order* screens or the screens modified for this transaction,²¹⁷ other carriers have more than sufficient excess capacity to absorb 10% of Sprint Nextel’s subscribers.²¹⁸ Save that single market, Minneapolis, rival carriers can absorb multiples

²¹⁵ See *id.* ¶¶ 115-157. The SAC does not account for possible differences in maximum spectrum utilization of different carriers, or that geographic areas may differ with respect to the assumed number of subscribers that can be served with a given amount of spectrum.

²¹⁶ This “full capacity” carrier is implicitly assumed to be unable to absorb any additional subscribers beyond normal growth at stable prices. Any additional subscriber capacity for this carrier would increase the capacity absorption ability of the rivals in that geographic area.

²¹⁷ See CRA Analysis ¶ 123, n.62 (“We also evaluated the SAC for the 16 markets that were identified by the FCC screen but not the 10% adjusted screen. *Each* of the 16 markets has enough SAC to absorb 10% of the share of Sprint Nextel.”) (emphasis in original).

²¹⁸ See *id.* ¶ 119, and Table 11.

of 10% of Sprint Nextel’s combined subscriber share.²¹⁹ This analysis alone powerfully demonstrates that Sprint Nextel will lack market power after consummation of the merger.²²⁰

Moreover, a more detailed examination of the Minneapolis Telephia market indicates that there is no cause for concern as to adequate capacity for competitor expansion. First, the SAC test is quite conservative, as it assumes that the “full capacity” carrier cannot absorb any additional subscribers.²²¹ This is very unlikely, given current national subscriber growth rates.²²² Second, Sprint Nextel’s competitors in Minneapolis, which include Verizon Wireless, Cingular, and T-Mobile, would need to expand by only four percent each to absorb ten percent of Sprint Nextel’s subscriber share.²²³ Given the presence of these carriers and their relative market shares (see CRA Analysis Table 2), sufficient capacity would seem to be a foregone conclusion. Finally, spectrum capacity in the market is very likely to grow as a result of Auction 58, in which 40 MHz of additional spectrum is available.²²⁴

The conclusion that the combined Sprint Nextel will lack market power to sustain a price increase above competitive levels after the merger is made more apparent by the fact that Sprint and Nextel are not each other’s closest substitutes. First, the two companies each has a different

²¹⁹ See *id.* ¶¶ 119-121.

²²⁰ The Telephia data also ascribe the subscribers of Sprint’s MVNO customers to Sprint. However, this understates the competitive impact of MVNO’s reselling Sprint’s service as these offerings do constrain retail prices. See *id.* ¶¶ 52-53, 118. Moreover, even if a market fails to satisfy the SAC test, this does not necessarily mean that a hypothetical price increase would actually be profitable. See *id.* ¶ 119.

²²¹ See *id.* ¶ 116.

²²² See *id.* ¶ 122.

²²³ See *id.*

²²⁴ See *id.* ¶ 123.

customer focus; Nextel's focus has been on business customers, while Sprint's wireless focus has traditionally been on consumers.²²⁵ Second, an analysis of WLNP data, as well as an analysis of Nextel's and Sprint's exit surveys, indicates that customers of Sprint generally do not see Nextel as the next closest substitute, and vice-versa.²²⁶ While the WLNP switching data and exit survey data may be subject to qualification (detailed in the CRA Analysis at ¶¶ 90-94 and 101), there is a strong indication that customers do not regard Sprint and Nextel as each other's closest substitutes. This fact supports a finding that the merger will not increase the combined company's ability to raise prices, as the combined company's subscribers are very likely to have their next-preferred carrier still available as an option.

Finally, as described in the CRA Analysis, "[u]nilateral incentives to raise price are reduced if the merger generates significant variable cost reductions."²²⁷ The reduction in variable costs creates an incentive to reduce price and increase output. As described in Section II(C) above, the proposed transaction will result in numerous cost reductions, including cost reductions in variable costs such as handsets, interconnection and backhaul, that will create downward price pressure.²²⁸ This downward price pressure would act contrary to any hypothetical incentive to increase price created by the merger.

Thus, the fact that competitors in each Telephia market will be able to relatively easily respond to any hypothetical post-merger price increase and absorb former Sprint Nextel

²²⁵ See *id.* ¶ 88.

²²⁶ See *id.* ¶ 89. Please refer to the confidential version of the CRA Analysis at ¶¶ 89-106 for a discussion of the results of CRA's analysis of switching data and exit surveys.

²²⁷ See CRA Analysis ¶ 124.

²²⁸ See *id.*

customers who leave as a result of the hypothetical increase, plus the fact that customers are quite likely to have their next-preferred carrier still available as an option after the merger, and the fact that cost reductions will put downward pressure on prices, all suggest that the risk of anticompetitive unilateral effects as a result of the proposed transaction is quite minimal, or even nonexistent, in all the markets analyzed in the CRA Analysis.

5. The Proposed Transaction Poses No Significant Risk Of Anticompetitive Coordinated Effects.

The CRA Analysis also follows the *Cingular Order* in its analysis of coordinated effects, including an examination of the number of firms, the transparency of information, firm, and product homogeneity, differing positions in technology, the presence of mavericks, existing cooperative ventures, and carriers' excess capacity. In addition, the CRA Analysis discussed the importance of efficiencies and network effects in such an analysis, ultimately concluding that "based on the Commission's methodology and our SAC analysis to date, there are unlikely to be coordinated effects problems resulting from this merger."²²⁹

At the outset, it is important to note that the Commission made several factual findings in the *Cingular Order* relevant to this analysis. First, the FCC concluded that there was no evidence that wireless rivals had restricted competition through coordinated interaction in specific markets.²³⁰ Perhaps even more important, the Commission was persuaded that "certain characteristics of the mobile telephony market, including firm heterogeneity and the presence of carriers with excess spectrum or network capacity, may continue to make it difficult for firms first to reach terms of coordination and then effectively to detect and punish deviations in

²²⁹ CRA Analysis ¶ 151.

²³⁰ See *Cingular Order* ¶ 164.

specific markets.”²³¹ There is still no evidence of coordinated action to restrict competition in mobile telephony, and rival heterogeneity and excess capacity continue to prevent coordinated interaction, in addition to other factors.

Number of Firms. As noted by CRA, the reduction in the number of firms providing mobile telephony services in a national or local markets by one is not by itself a sufficient basis for concluding that coordinated interaction is likely, particularly where there is no history of coordinated interaction.²³² This is particularly true considering the fact that numerous other carriers remain post-merger, both nationally and regionally/locally.²³³

Pricing Transparency. While consumer prices may be monitored to some extent by wireless competitors, this is constrained by the fact that some consumers purchase through their employers, which cannot be monitored.²³⁴ Moreover, the FCC found in the *Cingular Order* that “the record shows that carriers try to use the information they obtain about their rivals to improve their own ability to compete in attracting and retaining customers, either by matching the offers of rivals or by making more aggressive offers.”²³⁵ Finally, the number and complexity of pricing

²³¹ *Id.*

²³² *See* CRA Analysis ¶ 131.

²³³ *See id.* Table 1.

²³⁴ *See id.* ¶ 133.

²³⁵ *Cingular Order* ¶ 154. *See also id.* ¶ 155 (“Moreover, we believe that national wireless pricing innovations have been a major driver of price rivalry in the U.S. mobile telephony market, rather than a vehicle for coordinated interaction due to increased pricing transparency.”).

plans available in any given local market render it difficult to coordinate and extremely difficult to detect “cheating.”²³⁶

Firm Heterogeneity. This transaction does not materially disturb the firm heterogeneity found in the *Cingular Order*.²³⁷ Following the merger, wireless firms will still be quite asymmetrical and products will remain differentiated. There will be great differences between predominantly ILEC-independent Sprint Nextel and T-Mobile on the one hand, and predominantly ILEC-owned Verizon Wireless and Cingular on the other. This heterogeneity will continue to discourage coordinated interaction following the merger.²³⁸

Technology Development and Competition. The dynamic nature of competition and technological development in mobile telephony substantially inhibits coordination. Consumer demand for different “flavors” of 2.5G and 3G technology differs and remains uncertain. Wireless firms are generally in quite different positions in their technology migration, which inhibits service and functionality coordination. Moreover, the “lumpy” nature of investment limits tacit coordination.²³⁹

Network Effects. The wireless industry is subject to network effects due to lower costs for on-net calls and the benefits to customers of push-to-talk calls, which the combination of

²³⁶ See CRA Analysis ¶ 133, noting that Nextel has at least 25 plans available to consumers. Sprint has at least 15 pricing plans available to consumers (with a variety of additional offers that include extra features and minutes).

²³⁷ See *Cingular Order* ¶ 164.

²³⁸ See CRA Analysis ¶ 134.

²³⁹ See *id.* ¶ 135.

Sprint and Nextel will increase. As noted in the CRA Analysis, “[t]he desire to create network effects increases the benefits of deviating from a coordinated outcome.”²⁴⁰

Mavericks. In the *Cingular Order* the FCC found that “no single nationwide carrier is uniquely positioned to be a maverick,”²⁴¹ and that regional carriers would remain potential mavericks.²⁴² Nothing about the instant transaction changes that analysis.

Efficiencies. As noted herein repeatedly, the substantial efficiencies created by the merger give the combined company incentive to reduce prices, which would destabilize any coordinated outcome.²⁴³

Spectrum Capacity. Excess capacity creates incentives for competitors to “cheat” on any agreed coordinated outcome, and would allow firms not participating to expand and absorb customers from the coordinating firms. In the *Cingular Order*, the availability of excess capacity was a key part of the FCC’s analytic approach.²⁴⁴ Indeed, as the Commission noted in the *Cingular Order*, “a rival carrier may have a strong incentive to deviate from the terms of coordination if it has excess spectrum capacity and (or) network capacity relative to the traffic generated by its existing customer base.”²⁴⁵

The CRA Analysis presents an area-by-area analysis of spectrum capacity in the Telephia markets by examining whether a ten percent output (subscriber) reduction by the two largest

²⁴⁰ See *id.* ¶ 136.

²⁴¹ *Cingular Order* ¶ 162.

²⁴² See CRA Analysis ¶ 124.

²⁴³ See *id.* ¶ 139.

²⁴⁴ See, e.g., *Cingular Order* ¶ 184.

²⁴⁵ *Id.* ¶ 187.

firms could be absorbed by the remaining participants. Sprint Nextel would be one of the two largest firms in 61 of the 79 Telephia markets identified by the HHI screens modified for this merger.²⁴⁶ Using the SAC methodology,²⁴⁷ the CRA Analysis demonstrates that in these 61 Telephia markets, rivals are only unable to absorb the subscribers departing the coordinating firms in six markets.²⁴⁸ Nonetheless, even in these six markets, the risk of adverse coordinated effects is slight.

First, additional spectrum is available in Auction 58 in three of these markets, Kansas City, Minneapolis, and Houston.²⁴⁹ This additional spectrum will add to the capacity of smaller rivals; in Minneapolis, if 11 MHz of the 40 MHz available at auction is obtained by rivals, the estimated SAC would be sufficient to absorb the required subscriber share. Similarly, in Kansas City, if rivals obtain 3 MHz of the 30 MHz available, then the estimated SAC would be sufficient to absorb 10% of the (hypothetically) coordinating firms' subscriber share. In Houston, if rivals obtain 10 MHz of the 20 MHz available, the estimated SAC would be sufficient to absorb the required subscriber share.

²⁴⁶ See CRA Analysis ¶ 142 and Table 12.

²⁴⁷ Because Sprint and Nextel provided CRA spectrum shares only for the leading carriers for the top 106 markets, the CRA Analysis proceeded from the assumption that the non-Sprint Nextel member of the two leading firm group has a spectrum share proportional to its subscriber share. See *id.* nn.36 & 78.

²⁴⁸ See *id.* ¶ 141, Table 12. The markets are Minneapolis, MN, Houston, TX, Hammond, LA, Wilson, TX, Kansas City, MO-KS, and Chicago, IL.

²⁴⁹ In the *Cingular Order*, the FCC found that “[s]pectrum aggregation by the Applicants in markets where additional spectrum licenses will be auctioned in January 2005 is less potentially harmful than aggregation in other markets. The entry this auction will enable is largely within the Commission’s control, and thus we can relatively confident it will occur.” *Cingular Order* ¶ 190, n.472.

Second, in Kansas City, Minneapolis, Houston, and Chicago, the combined shares of the two leading firms are low enough that coordination would be difficult to maintain.²⁵⁰ Perhaps just as important, in three of the six markets (Kansas City, Minneapolis, and Houston) there will be four mobile telephony providers after the merger with a substantial market presence, and in Chicago, there will be five. Each of these competitors would have incentive to constrain coordination by the two leading firms.²⁵¹

Finally, Wilson, TX and Hammond, LA, are two markets for which the Telephia data did not provide spectrum share information; the gap-filling assumption that the full capacity SAC ratio for these markets is the average of the maximum ratio in the 106 markets for which CRA had spectrum data may skew the analysis. This and other necessary assumptions appear to have distorted the analysis.²⁵² Once these distortions are corrected, both Wilson, TX and Hammond, LA, pass the SAC test.²⁵³ Similarly, in Minneapolis and Houston, the estimated SAC of the smaller rivals is negative, which likely either indicates the full capacity SAC is implausibly low, or that CRA lacked data on the spectrum holding of some of the rival carriers in those markets.²⁵⁴

In sum, all of the factors informing a coordinated effects analysis point toward a quite minimal risk that coordinated action will be more likely after the merger.²⁵⁵ Indeed, many of the

²⁵⁰ See CRA Analysis ¶¶ 145-149.

²⁵¹ See *id.* ¶¶ 145-149.

²⁵² See CRA Analysis ¶ 150, n.81.

²⁵³ See *id.* ¶ 151.

²⁵⁴ See *id.* ¶¶ 145, 149.

²⁵⁵ Note that of the 16 Telephia markets identified in the *Cingular Order* screens, but not in the screens modified for this transaction, only five have Sprint Nextel as one of the two

factors point strongly, perhaps even decisively, in the other direction. Fears of coordinated interaction resulting from this merger would be entirely misplaced.

C. International Authorization.

The instant transaction also involves the transfer of control of Nextel's international Section 214 authorization, which permits Nextel to provide global facilities-based and resold international services. Sprint is widely recognized as one of the leading providers of international services, and meets all of the qualifications to hold international 214 authority.²⁵⁶ Grant of the instant application will ensure that Sprint is able to continue to offer seamless international services to existing Nextel customers.

The proposed transaction poses no risk of anticompetitive impact on the U.S. international telecommunications marketplace. Nextel holds only a very small share of the international telecommunications market. The Commission's principal concern for "the exercise of foreign market power in the U.S. market" is that such market power "could harm U.S. consumers through increases in prices, decreases in quality, or reductions in alternatives in end user markets."²⁵⁷ Generally, this risk occurs when "a U.S. international carrier . . . is affiliated

leading firms. In only two of those five markets, Tampa and San Antonio, would the SAC test indicate that sufficient capacity could be lacking to respond to a coordinated price increase. In Tampa, the combined share is so low that an agreement on coordinated action would be difficult to maintain, and the SAC calculation is negative for the rivals, which would indicate that the SAC maximum ratio is unrealistically low. In San Antonio, the SAC maximum ratio is 1.06, an unrealistically low ratio; moreover, 30 MHz of spectrum is available in San Antonio in Auction No. 58. *See id.* ¶ 151, n.82.

²⁵⁶ *See* 47 C.F.R. § 63.12.

²⁵⁷ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891 ¶ 146 (1997).

with a foreign carrier that has sufficient market power on the foreign end of a route to affect competition adversely in the U.S. market.”²⁵⁸ As a result of this proposed transaction, Sprint will acquire no new affiliations with foreign carriers presumed to have market power. Moreover, of the current foreign affiliations of Sprint, none of those carriers is dominant, and Sprint is not regulated as dominant on any foreign route. Accordingly, the transaction will have no adverse impact on competition in the international telecommunications marketplace.

IV. REQUEST FOR PROCEDURAL CONSIDERATIONS.

A. Request For Approval Of Additional Authorizations.

As set forth in the transfer of control applications, Nextel controls entities holding numerous Commission licenses. The lists of call signs referenced in the applications are intended to be complete and to include all licenses held by the respective licensees that are subject to the transaction. Nextel, however, may have on file or may hereafter file additional requests for authorizations for new or modified facilities, which may be granted or remain pending during the pendency of this application. Accordingly, the Applicants request that the FCC authorize Sprint to acquire control of the following upon the grant of the transfer of control applications:

1. any authorization issued to Nextel’s subsidiaries during the Commission’s consideration of the transfer of control applications and the period required for consummation of the transaction following approval;
2. construction permits held by such licensees that mature into licenses after closing and that may not have been included in the transfer of control applications; and
3. applications that are filed after the date of these applications and are pending at the time of consummation.

²⁵⁸ *Id.* ¶ 231.

Such actions would be consistent with Commission precedent.²⁵⁹ To the extent necessary, the Applicants also request authority to transfer domestic 214 authority of Nextel's subsidiaries. Moreover, the parties request that Commission approval of the transfer applications include any facilities that may have been inadvertently omitted.

In addition, Sprint and Nextel hereby request a blanket exemption from Sections 1.927(h) and 1.933(b) of the FCC's rules, 47 C.F.R. §§ 1.927(h), 1.933(b). Specifically, the Applicants request that amendments reporting a change in ownership not be treated as major amendments that require a second public notice for still-pending applications. Grant of the exemption is consistent with FCC precedent finding that the ownership changes with respect to the pending applications are part of a larger transaction undertaken for legitimate business purposes.²⁶⁰

B. Unconstructed Facilities.

Nearly all of the FCC authorizations covered by the transfer of control applications involve constructed facilities. However, certain geographic-area licensed facilities in the Enhanced Specialized Mobile Radio service ("ESMR"), the Wireless Communications Service ("WCS"), the 700 MHz Guard Band, and the Broadband Radio Service ("BRS"), are authorized

²⁵⁹ See *Cingular Order* ¶ 275; *Application of WorldCom, Inc., and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc., Memorandum Opinion and Order*, 13 FCC Rcd 18025 ¶ 226 (1998); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, Memorandum Opinion and Order*, 12 FCC Rcd 19985 ¶ 247 (1997); *Applications of Craig O. McCaw and AT&T for Consent to Transfer of Control of McCaw Cellular Communications, Inc. and Its Subsidiaries, Memorandum Opinion & Order*, 9 FCC Rcd 5836, n.300 (1994) ("McCaw/AT&T Order").

²⁶⁰ See, e.g., *Applications of PacifiCorp Holdings, Inc., Transferor, and Century Telephone Enterprises, Inc., Transferee, For Consent to Transfer Control of Pacific Telecom, Inc., a Subsidiary of PacifiCorp Holdings, Inc., Memorandum Opinion and Order*, 13 FCC Rcd 8891 ¶ 47 (1997); *McCaw/AT&T Order*, n.300.

but not yet required to be constructed. The transfer of control of these unbuilt facilities is incidental to this transaction, with no separate payment being made for any individual authorization or facility. Accordingly, there is no reason to review the transaction from a trafficking perspective.²⁶¹

²⁶¹ See 47 C.F.R. § 1.948(i) (authorizing the Commission to request additional information if the transaction appears to involve unconstructed authorizations obtained for the “principal purpose of speculation”); *id.* § 101.55(c)-(d) (permitting transfers of unconstructed microwave facilities provided that they are “incidental to the sale [of] other facilities or merger of interests”); *id.* § 90.685(b) (providing three and five year benchmarks for construction of ESMR geographic area licenses; *id.* § 27.14(a) (providing for a substantial service showing within the license term of 700 MHz Guard Band and WCS licenses). Further, construction requirements for certain BRS licenses were suspended by the Commission in *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 ¶¶ 199-202 (2003).

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the individual applications filed herewith, the proposed transaction complies with all applicable Commission rules, and will serve the public interest. The merger will create a strengthened competitor to well serve consumers of wireless communications services. Sprint and Nextel accordingly urge the Commission to act promptly to grant these applications.

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